(25,207)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 427.

VICTOR HERBERT, HARRY B. SMITH, ET AL., PETITIONERS,

vs.

THE SHANLEY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 14, 1916.

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a United States Circuit Court of Appeals for the Second Circuit.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, Inc., Complainants-Appellants,

against

THE SHANLEY COMPANY, Defendant-Appellee.

TRANSCRIPT OF RECORD.

Appeal from the United States District Court for the Southern District of New York.

1 *Equity Subpœna.*

The President of the United States of America to The Shanley Company, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by Victor Herbert, Harry B. Smith, Robert B. Smith, Fred de Gresac Maurel and G. Schirmer, Inc., and to further do and receive what the said Court shall have considered in this behalf; and this you are not to omit under the penalty on you of Two hundred and fifty dollars ($250).

Witness, Honorable Charles M. Hough, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 14th day of April, in the year one thousand nine hundred and fifteen and of the Independence of the United States of America the one hundred and thirty-ninth.

ALEX. GILCHRIST, JR., *Clerk.*

NATHAN BURKAN,
Complainants' Sol'r.

The defendant is required to file its answer or other defense in the above cause in the Clerk's office of this Court, on or before the twentieth day after service hereof excluding the day of said service;
2 otherwise the bill aforesaid may be taken pro confesso.

[SEAL.] ALEX. GILCHRIST, JR., *Clerk.*

Filed, U. S. D. C.—S. D. of N. Y.—April 15, 1915.

Affidavit of Service of Subpœna.

I hereby certify that on the 14th day of April, 1915, at the City of New York, in my district, I served the within subpœna in equity

upon the within named defendant, The Shanley Company by exhibiting to Francis Gilbert, as a member of the firm of Gilbert Lauterstein and Gilbert, attorneys for said defendant, at No. 43 Exchange Place, N. Y. City, as per admission of service endorsed hereon, the within original and at the same time leaving with him a copy thereof.

THOMAS D. McCARTHY,
United States Marshall,
Southern District of New York.

Dated, April 15, 1915.
Filed, U. S. D. C.—S. D. of N. Y.—April 15, 1915.
Admission of service on back of original subpœna.
Service of the within subpœna is hereby accepted.
April 14, 1915.

GILBERT, LAUTERSTEIN & GILBERT,
By FRANCIS GILBERT,
Attorneys for Defendant.

3 *Bill of Complaint.*

District Court of the United States, Southern District of New York.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, Inc., Complainants,
against
THE SHANLEY COMPANY, Defendant.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

I. That your orators Victor Herbert, Harry B. Smith and Robert B. Smith are residents and citizens of the Borough of Manhattan, City of New York, in the Southern District of New York; that your orator Fred de Gresac Maurel is a resident and citizen of the Republic of France; that your orator G. Schirmer, Inc., at all of the times hereinafter mentioned was and still is a corporation duly organized under the laws of the State of Virginia, having its principal place of business in the Borough of Manhattan, City of New York, Southern District of New York.

II. That at all of the times hereinafter mentioned your orator G. Schirmer, Inc., was engaged in the business of publishing operas, musical compositions and other works.

4 III. Upon information and belief, that the defendant was at all of the times hereinafter mentioned and still is a business corporation organized and existing under the Business Corporations Law of the State of New York, and that it was organized for the purpose of conducting and maintaining a restaurant and place of public accommodation and entertainment for profit; and that it

had and has its principal place of business in the Borough of Manhattan, City of New York, in the Southern District of New York.

IV. That at all of the times hereinafter mentioned the defendant conducted and maintained and still conducts and maintains a restaurant and place of public accommodation, refreshment and entertainment for gain on Broadway, between 43rd and 44th Streets, in the Borough of Manhattan, City of New York.

V. That prior to the 17th day of March, 1913, your orator Fred de Gresac Maurel wrote, composed and originated a new and original scenario of a comic opera, and before the 17th of March, 1913, your orator Harry B. Smith adapted the said scenario and developed and completed the same and made the same suitable for representation as a book of a comic opera.

That prior to the 17th day of March, 1913, your orator Robert B. Smith, wrote and originated new and original lyrics as part of said opera to be sung and rendered as part of said opera, and prior to said 13th day of March, 1913, your orator Victor Herbert, composed and set original music to said book and lyrics of said opera, and the said scenario, book, lyrics and music constituted a dramatico-
5 musical composition or comic opera for which work your orators Fred de Gresac Maurel, Harry B. Smith, Robert B. Smith and Victor Herbert, adopted the title "Sweethearts."

VI. That thereafter and on the 2nd day of April, 1913, your orator G. Schirmer, Inc., having been duly authorized to do so, copyrighted the said vocal score of the said dramatico-musical composition entitled "Sweethearts" by publishing the same and offering the same to the general public in the City of New York, on the 2nd day of April, 1913, with the following notice of copyright on the title page, to wit: "Copyright 1913 by G. Schirmer, Inc." That the right to copyright said vocal score was granted to your orator G. Schirmer, Inc., subject to the condition that the performing right shall belong to your orators Victor Herbert, Harry B. Smith, Robert B. Smith and Fred de Gresac Maurel who are the sole owners of the performing rights therein and of the right to authorize the public performance thereof.

VII. That after the publication of said vocal score of the dramatico-musical composition under the title "Sweethearts" with notice of copyright as aforesaid, your orator G. Schirmer, Inc., deposited in the office of the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition then published and paid to the Register of Copyrights the fee required by law for the registration of said work, and said work was duly registered by said Register of Copyrights on the 4th day of April, 1913.

That thereafter the Register of Copyrights issued to your
6 orator G. Schirmer, Inc., a certificate of copyright registration of the said vocal score of said dramatico-musical composition, in pursuance to the copyright law as more fully appears by the certificate of copyright hereto annexed and marked Exhibit "A," and made a part hereof.

VIII. That since the said 2nd day of April, 1913, the vocal score of said dramatico-musical composition has been published by your

orator G. Schirmer, Inc., and there has been inscribed on the title page of each copy thereof published or offered for sale by authority of your orators G. Schirmer, Inc., or of any of your orators the copyright notice required by law in the following words: "Copyright 1913 by G. Schirmer, Inc."

IX. That the vocal number "Sweethearts," consisting of words and music was written and composed as a part of said dramatico-musical composition and is a link of the dramatic action of the said dramatico-musical composition, and the said number is a component part of the said dramatico-musical composition and is contained in the said book and vocal score of the said dramatico-musical composition.

X. That copyright of the book of said dramatico-musical composition was secured by your orator Harry B. Smith on behalf of himself and of your orators Victor Herbert, Fred de Gresac Maurel and Robert B. Smith, by depositing with Claim of Copyright one complete copy of such book in the office of the Register of Copyrights, Washington, District of Columbia, on the 18th day of April, 1913.

That the said book has not been published, publicly distributed or reproduced in copies for sale.

7 That a certificate of copyright registration of the said dramatico-musical composition in pursuance of the copyright law was issued to your orator Harry B. Smith by the Register of Copyrights as more fully appears by the certificate of copyright hereto annexed and marked Exhibit B and made a part hereof.

XI. That prior to the 17th day of March, 1913, your orators Victor Herbert, Harry B. Smith, Robert B. Smith and Fred de Gresac Maurel caused Werba & Luescher, theatrical managers and producers, to publicly perform and represent upon the public stage the said dramatico-musical composition. That said Werba & Luescher did in preparation for the public performance and representation of the said opera make an extensive production therefor, consisting of sceneries, costumes, accessories and other paraphernalia engaged artists and entered into booking contracts for the public performance and representation thereof in a theatre in New York City.

That the said Werba & Luescher gave the first performance of the said opera on March 17th, 1913, and continued the performances thereof for a long time, and the same has been a great financial and artistic success.

XII. That the said vocal number "Sweethearts" was publicly sung, rendered and performed in and as part of the public performances and representation of the said opera "Sweethearts" and the said number was an important part of the said opera and is the leading vocal number of the said opera, and the success and popularity of the said opera "Sweethearts" is largely due to the popularity and value of the said musical number.

8 XIII. That the said opera "Sweethearts" has acquired a valuable reputation and great popularity with the public through its intrinsic merits, and through the expenditure of large sums of money in advertising the performances of the same and for its cast, production and accessories, and the said opera became very successful and a source of great profit to your orators (excepting G.

Schirmer, Inc.) who realized large sums of money from the performances of the same by way of royalties based upon a percentage of the gross receipts of each and every performance th-reof. The said opera "Sweethearts" is of great value and exceeds in value the sum of Five thousand ($5,000.00) Dollars, and the damages suffered by your orators by reason of the wrongful acts of the defendant hereinafter mentioned exceed the sum of Five thousand ($5,000.00) Dollars, and the value of the injunction prayed for herein exceeds the sum of Five thousand ($5,000.00) Dollars.

XIV. Upon information and belief that the defendant on the 1st day of April, 1915, and at other times subsequent thereto, without the knowledge, consent, permission or approval of your orators, and against the will of your orators and in infringement of the said copyright in the said dramatico-musical composition "Sweethearts" and of the said copyright in the said vocal score of said composition, and in violation of the right of your orators in the said dramatico-musical work produced, performed and represented publicly in the defendant's restaurant and place of public entertainment on said premises known as "Shanley's," Broadway 43 and 44th Streets, New York City, the said vocal number "Sweethearts" and caused the said number to be played and performed by professional singers upon a
9 stage maintained by the defendant in the dining hall of said premises accompanied by an orchestra. That the said vocalists and orchestra were engaged by the defendant to perform and play upon said premises for compensation; that the said performances of the said vocal number on the said premises were public and were not given for a charitable, religious or educational purpose, but were given for the purpose of the defendant's business and as part of the service rendered to the patrons of the defendant's said establishment who purchased and partook of meals or refreshments at said establishment, and said performances were given as one of the special features of the said business.

XV. That the defendant advertised the business conducted on said premises in the New York Review, the New York Times and other papers published and circulated in the City of New York, in the manner following, to wit:

"Shanley's,

Broadway—43rd to 44th St.

Perfection in Food and Service.

Inimitable Entertainment.

Cabaret Extraordinaire.

Twenty Acts Every Evening 7 to 1.

Superior Seven-course Luncheon, 75c. (Music.)"

Famous
for
Dinners
and
Suppers.

XVI. On information and belief: That the said performances of said vocal number of said opera by the orchestra and the professional vocalists employed by the defendant were given by the defendant for the entertainment and amusement of the patrons patronizing said establishment, and purchasing food for refreshments of the defendant, and for the purpose of attracting patrons to said establishment, and in order to make the business of the defendant profitable.

XVII. On information and belief: That the said performances of said vocal number of said opera were part of a theatrical entertainment given by the defendant upon said premises in order to attract patrons to its said establishment and for the entertainment and amusement of its patrons gives a theatrical entertainment which consists of a series of theatrical exhibitions, the performers of which acts or exhibitions are under the pay of the defendant, and the weekly cost of the entertainment offered to the public during each week is upwards of One thousand ($1,000.00) Dollars. That the defendant did and does advertise the said theatrical entertainment as an inducement to patrons to dine and partake of refreshments in defendant's restaurant.

XVIII. That the said wrongful public performances and representations by the defendant of said vocal number "Sweethearts" have attracted and are attracting many persons to the defendant's place of business to hear the said vocal number, and the defendant threatens to continue the unlawful and wrongful performances of the said numbers.

XIX. That the acts of the defendant are causing great injury and damage to the business and profits of your orators, because they are thereby deprived of the exclusive right to publicly perform and represent the said dramatico-musical composition "Sweethearts" and to grant to others the privilege to publicly

perform and represent the said composition on the payment of royalties. That no proprietor, lessee or manager of any place of entertainment or amusement will make a contract with your orators for the privilege to publicly perform the said musical comedy in public upon the payment of a license fee or royalty, if the defendant is permitted to continue the unlawful acts hereinabove set forth, and it will further seriously injure your orators in the profits to be derived from the public performances of the said opera and will further diminish the value of said opera and that the injury cannot be accurately ascertained or computed, and that your orators, by reason of the aforesaid unlawful use of their property, are irreparably injured, all of which acts are contrary to equity and good conscience, and tend to the injury and wrong of your orators.

And your orators further show that they have no adequate and available remedy at law against the said continued violation of their rights, inasmuch as the injury is a continuous one and involves endless litigation and furthermore, is of such a nature that the extent of your orators' loss could not be measured or estimated or proved to the full measure thereof produced.

Wherefore, your orators pray:

I. That a writ of subpœna issue out of this Court, directed to the defendant, commanding the defendant on a day therein named to appear in this Court and make answer to this bill.

12 II. That the defendant, its agents and servants, and all other persons acting under the direction, control, permission or license of the defendant, be enjoined and restrained, during the pendency of this action and perpetually, from publicly performing or reproducing the dramatico-musical composition "Sweethearts" or any part thereof, and from causing or permitting the said composition, to be publicly represented and performed in the defendant's establishment known as "Shanley's" on Broadway, between 43rd and 44th Streets, in the Borough of Manhattan, City of New York, or in any place owned, controlled or conducted by the defendant in the public performance of said composition in any such place.

III. That your orators, excepting your orator G. Schirmer, Inc., have judgment against the defendant for the sum of Five thousand ($5,000.00) Dollars for damages.

IV. That your orators have such other and further relief as may be just and equitable.

NATHAN BURKAN,
Solicitor for Complainants.

VICTOR HERBERT,
ROBERT B. SMITH,
FRED DE GRESAC MAURIEL,
G. SCHIRMER, INC.,
By G. SCHIRMER, *Secretary,*
Complainants.

13 STATE OF NEW YORK,
City and County of New York, ss:

G. Schirmer, being duly sworn, deposes and says: That he is the secretary of G. Schirmer, Inc., one of the complainants in the within action; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. That the reason why this verification is made by deponent and not by complainant is that the complainant is a corporation.

G. SCHIRMER, *Secretary.*

Sworn to before me this 13th day of April, 1915.
[SEAL.] ABRAHAM KIPP,
Notary Public, N. Y. Co. #2001.

STATE OF NEW YORK,
City and County of New York, ss:

Victor Herbert, being duly sworn, deposes and says: That he is one of the complainants in the within action; that he has read the foregoing bill of complaint, and knows the contents thereof; that the same is true to his own knowledge, except as to the matters
14 therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

VICTOR HERBERT.

Sworn to before me this 13th day of April, 1915.
[SEAL.] ABRAHAM KIPP,
Notary Public, N. Y. Co. #2001.

STATE OF NEW YORK,
City and County of New York, ss:

Robert B. Smith, being duly sworn, deposes and says: That he is one of the complainants in the within action; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

ROBERT B. SMITH.

Sworn to before me this 13th day of April, 1915.
[SEAL.] ABRAHAM KIPP,
Notary Public, N. Y. Co. #2001.

STATE OF NEW YORK,
City and County of New York, ss:

Fred de Gresac Maurel, being duly sworn, deposes and says: That she is one of the complainants in the within action; that she
15 has read the foregoing bill of complaint and knows the contents thereof; that the same is true to her own knowledge, ex-

cept as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

FRED DE GRESAC.

Sworn to before me this 13th day of April, 1915.

[SEAL.] ABRAHAM KIPP,
Notary Public, N. Y. Co. #2001.

Filed U. S. D. C.—S. D. of N. Y., April 14, 1915.

EXHIBIT "A," ANNEXED TO BILL OF COMPLAINT.

24029.

Copyright Office of the United States of America.

Library of Congress—Washington.

Certificate of Copyright Registration.

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, that two copies of the Dramatico-Musical Composition named herein have been deposited in this Office under the provisions of the said Act, and that registration for copyright for the first
16 term of 28 years from the date of publication thereof has been duly made in the name of G. Schirmer, 3 E. 43rd St., New York, N. Y. Sweethearts. A comic opera in two acts. Book by Harry B. Smith and Fred de Gresac, Lyrics by Robert B. Smith, of United States. Music by Victor Herbert of United States. Vocal score.

Copies received Apr. 4, 1913.

Date of publication Apr. 2, 1913. Entry: Class D,XXc, No. 19276.

EXHIBIT "B," ANNEXED TO BILL OF COMPLAINT.

Copyright Office of the United States of America,

Library of Congress,

Washington, D. C.

Certificate of Copyright Registration.

This is to certify (in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913), that one copy of the Dramatic Composition named herein has been

deposited in this office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of twenty-eight years has been duly made in the name of Harry B. Smith, claimant of copyright, whose address is 319 W. 107th St., New York, N. Y.; the title of the dramatic composition registered is
17 Sweethearts. Book by Harry B. Smith and Fred de Gresac, Lyrics by Robert B. Smith. Music by Victor Herbert. A comic opera in 2 acts, book and lyrics, the authors are citizens of United States; one copy was received April 18, 1913, and registration has been made as Class D, XXc., No. 32987.

(SEAL.) ARTHUR CRISFIELD,
Assistant Register of Copyrights.

Order to Show Cause and Affidavits in Support of Motion for Injunction.

District Court of the United States, Southern District of New York.

VICTOR HERBERT, HARRY B. SMATH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, Inc., Complainants,
against
THE SHANLEY COMPANY, Defendant.

Upon the bill of complaint in this action and the affidavits of Victor Herbert, John Leffler and Samuel W. Tannenbaum, verified the 12th day of April, 1915, respectively, the subpoena and the exhibits hereto annexed,

18 Let the defendant or its attorney show cause before one of the Judges of this Court, at a Stated Term thereof, to be held at the General Post Office Building, in the Borough of Manhattan, City of New York, at Room 235, on the 16th day of April, 1915, at the opening of the court or as soon thereafter as counsel can be heard, why an order should not be made restraining the defendant from publicly performing or representing the comic opera "Sweethearts" or any part thereof, including the musical composition "Sweethearts," and from causing the said composition to be publicly represented and performed and from aiding and abetting the performance of said musical work and from permitting the said musical work to be performed, sung or played in the defendant's establishment known as Shanley's, Broadway, between 43rd and 44th Streets, Borough of Manhattan, City of New York, or in any place owned or conducted by the defendant; and for such other and further relief as to the Court may seem just.

Service of a copy of this order on or before the 14th day of April, 1915, is hereby made sufficient service of this order and notice of this application.

Dated, New York, April 14, 1915.

LEARNED HAND, *D. J.*

Filed, U. S. D. C.—S. D. of N. Y.—April 29, 1915.

19 *Affidavit of John Leffler in Support of Motion for an Injunction.*

District Court of the United States, Southern District of New York.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, Inc., Complainants,
against
THE SHANLEY COMPANY, Defendant.

SOUTHERN DISTRICT OF NEW YORK,
State of New York, City and County of New York, ss:

John Leffler, being duly sworn, deposes and says that I am a theatrical manager, and have an office at No. 1402 Broadway, City and County of New York.

During the evening of April 1st, 1915, I entered the premises known as "Shanley's," between 43rd and 44th Streets, Borough of Manhattan, City of New York, occupied by the defendant herein.

That the said premises are adapted to and used for restaurant purposes and for the entertainment and refreshment of the general public.

A large platform is erected thereon and various professional actors and actresses appear on said platform and give performances for the amusement of the patrons of the defendant.

20 That said performance is known as a Cabaret Extraordinaire, and consists of twenty acts and is given between the hours of seven and one P. M. daily.

At the time I entered the said premises the said Cabaret Extraordinaire was in progress. That during the performance an orchestra appeared on the platform and played the music of the complainants' composition entitled "Sweethearts" from the comic opera "Sweethearts" and a vocalist sang the words thereof. The said orchestra played the entire music and the said vocalist sang the words from the complainants' composition "Sweethearts."

That I am familiar with the said song and have heard the same played and sung many times, and know that the music played and sung on said premises as aforesaid by the said orchestra and vocalist was the complainants' composition "Sweethearts" from the comic opera "Sweethearts."

That I entered the said premises, sat down at a table and a waiter came over to me and asked me what I wanted to order, that I ordered refreshments for which I paid.

That the said Cabaret Extraordinaire was one of the principal attractions and features of the defendant's business, and is produced by the defendant at an expense of upwards of One thousand ($1,000.00) Dollars per week.

JOHN LEFFLER.

Sworn to before me this 12th day of April, 1915.
[SEAL.] ABRAHAM KIPP,
Notary Public, N. Y. Co. No. 2001.

Filed, U. S. D. C.—S. D. of N. Y.—April 29, 1915.

21 *Affidavit of Samuel W. Tannenbaum in Support of Motion for an Injunction.*

District Court of the United States, Southern District of New York.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, INC., Complainants,
against
THE SHANLEY COMPANY, Defendant.

SOUTHERN DISTRICT OF NEW YORK,
County of New York, ss:

Samuel W. Tannenbaum, being duly sworn, deposes and says: That the following is an advertisement that appeared in the New York Times, a newspaper published and circulated in the City of New York. That the following advertisement was published in the issue of said newspaper dated April 8th, 1915:

"SHANLEY'S
Famous for Dinners and Suppers
Broadway—43rd to 44th St.
Perfection in Food and Service,
Inimitable Entertainment.
CABARET EXTRAORDINAIRE
Twenty Acts Every Evening 7 to 1

SUPERIOR SEVEN-COURSE
LUNCHEON, 75c. (MUSIC)."

22 That I cut the above advertisement from a copy of said issue of said newspaper The New York Times dated and published April 8th, 1915.

That similar advertisements of the musical and dancing entertainments given at defendant's restaurant known as Shanley's have appeared in the New York Times and other daily newspapers circulated in New York City prior and subsequent to April 8th, 1915.

SAMUEL W. TANNENBAUM.

Sworn to before me this 13th day of April, 1915.
[SEAL.] ABRAHAM KIPP,
Notary Public, N. Y. Co. #2001.

Filed, U. S. D. C.—S. D. of N. Y.—April 29, 1915.

23 *Affidavit of Victor Herbert in Support of Motion for an Injunction.*

District Court of the United States, Southern District of New York.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, INC., Complainants,
against
THE SHANLEY COMPANY, Defendant.

SOUTHERN DISTRICT OF NEW YORK,
State of New York, City and County of New York, ss:

Victor Herbert, being duly sworn, deposes and says: I am one of the above-named complainants. I have read the bill of complaint herein and that the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief and as to those matters I believe it to be true, and I make the said bill of complaint part of this affidavit.

I am a composer of a number of copyrighted operas and the value of my copyrights depends largely on my exclusive right to control the public representation of the works copyrighted.

The methods resorted to by the defendant of attracting patronage to its establishment, by giving public performances of copyrighted works, have been widely adopted by other proprietors of hotels, restaurants and places of public accommodation.

24 Appended hereto are advertisements appearing in the daily press showing that regular theatrical performances are being given nightly in hotels, restaurants and places of public accommodation, although no direct pecuniary charge or fee is made, in order to attract patronage.

The legalizing of the practice complained of will cause a diminution of the attendance at licensed performances of the complainants' opera "Sweethearts" and will deprive us of the power to prevent the inferior rendition of our works and the injury to the artistic reputation of the works that would result from such inferior rendition.

If unlicensed performances of the opera "Sweethearts" are permitted in hotels, restaurants and similar resorts, the most valuable parts of the opera "Sweethearts" may be produced in these places simultaneously with the licensed performances, and the success of the licensed performances will be thus seriously hampered.

As the defendant is now giving public performances of said composition and is threatening to continue to give the same upon its premises and the value of the complainants' rights in said composition is being diminished by reason of the unlawful acts of defendant, an order is respectfully asked for returnable at the earliest possible moment directing the defendant or its attorney to show cause why an order should not be made enjoining and restraining the defendant, its agents, servants and employees from in any manner

publicly producing, performing or representing the composition set forth in the bill of complaint or any part thereof or any imitation or simulation thereof any why the complainants should not have such other and further relief as to the Court may seem just.

25 That no previous application for the order now asked for has been made to any Court or Judge.

VICTOR HERBERT.

Sworn to before me this 13th day of April, 1915.

[SEAL.] ABRAHAM KIPP,
Notary Public, N. Y. Co. #2001.

Filed U. S. D. C.—S. D. of N. Y. April 29, 1915.

Answer.

District Court of the United States, Southern District of New York.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL and G. SCHIRMER, INC., Complainants,
against
THE SHANLEY COMPANY, Defendant.

For its answer to the bill of complaint herein, the defendant alleges:

I. The defendant admits that it is a domestic corporation organized and existing under and pursuant to the laws of the

26 State of New York, and that it is maintaining a restaurant and place of public accommodation in the Borough of Manhattan, City of New York, in the Southern District of New York, but denies each and every other allegation contained in the paragraph marked or numbered "III" of the bill of complaint.

II. The defendant admits the allegations contained in the paragraph marked or numbered "IV" of the bill of complaint that it maintains a restaurant and place of public accommodation and refreshment on Broadway between 43rd and 44th Street, in the Borough of Manhattan, City of New York, but it denies each and every other allegation contained in the said paragraph marked or numbered "IV" of the bill of complaint.

III. The defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in the paragraph marked or numbered "VI" of the bill of complaint, except that it admits that complainants duly copyrighted said work "Sweethearts."

IV. The defendant denies any knowledge or information as to the allegations contained in the paragraph marked or numbered "XIII" of the bill of compliant, except that the defendant denies that the complainants suffered any damages by reason of the acts of the defendant as set forth in the bill of complaint as is alleged in paragraph "XIII" thereof.

V. The defendant admits that on the 1st day of April, 1915, and other times subsequent thereto, the defendant, through its
27 agents, servants and employees, caused to be sung in the defendant's restaurant known as "Shanley's" at Broadway between 43rd and 44th Street, Borough of Manhattan, New York City, a vocal selection published by G. Schirmer, Inc., and sold to the defendant's agents, servants or employees, and known as "Sweethearts." That the said song "Sweethearts" was a vocal selection published in sheet music form and published and sold separately and not as part of any dramatico-musical composition. The defendant also admits that the persons singing the said song known as "Sweethearts" received compensation therefor from the defendant, but it denies each and every other allegation contained in the paragraph marked or numbered "XIV" of the bill of complaint except as herein otherwise specifically admitted. The defendant further alleges that the said song "Sweethearts" was sung in the restaurant conducted by the defendant for the entertainment of the patrons of the said restaurant exclusively. That no admission fee or other charge was made to the patrons of said restaurant.

VI. The defendant admits that the rendition of said vocal selection known as "Sweethearts" was given by the defendant to its patrons patronizing the restaurant conducted by it, but the defendant denies each and every other allegation contained in the paragraph marked or numbered "XVI" of the bill of complaint.

VII. The defendant denies each and every allegation contained in the paragraph marked or numbered "XVII" of the bill of complaint.

VIII. The defendant denies each and every allegation contained in the paragraph marked or numbered "XVIII" of the bill of complaint.

28 IX. The defendant denies each and every allegation contained in the paragraph marked or numbered "XIX" of the bill of complaint.

For a first, separate and distinct defense to the alleged cause of action contained in the bill of complaint herein, the defendant alleges:

X. That the complainant, G. Schirmer, Inc., with the knowledge and consent of the complainants Victor Herbert, Harry B. Smith, Robert B. Smith and Fred de Gresac Maurel, published the musical composition known as "Sweethearts" and referred to in the bill of complaint as a separate vocal number, and that said vocal number "Sweethearts" was copyrighted separate and apart from any dramatico-musical composition, and that said vocal number "Sweethearts" was published and offered for sale and sold to the defendant and to the public generally by the complainant G. Schirmer, Inc., as a separate musical composition and not as part of any dramatico-musical composition.

XI. That the defendant caused a copy of said vocal composition known as "Sweethearts" to be purchased and by virtue of the purchase of the said vocal number referred to, the defendant was authorized and empowered by the complainants to perform said

musical composition or cause the same to be performed in the defendant's restaurant as herein set forth.

XII. That the said musical composition or vocal number referred to in the bill of complaint as "Sweethearts" was caused to be performed by the defendant in the restaurant conducted by it as set forth in the bill of complaint. That no charge was made by the defendant for admission to the said restaurant or for the privilege of listening to any performance of music therein, or of listening to the performance of the said vocal number "Sweethearts" therein. That no additional charge was made for meals furnished in said restaurant at the time when such music or such vocal composition was performed over the charge made when there was no music and no vocal compositions performed.

XIII. That the rendition of such vocal number was incidental to the restaurant business as conducted by the defendant as herein set forth. That the said musical composition or vocal number entitled "Sweethearts" mentioned and described in the bill of complaint herein was not performed by the defendant or caused to be performed by the defendant publicly for profit.

XIV. That the said vocal number or musical composition known as "Sweethearts" and referred to in the bill of complaint as published by the complainant, G. Schirmer, Inc., and as sold to the defendant and to the public generally and as performed in the defendant's restaurant, was not a portion of any dramatico-musical composition.

For a second, separate and distinct defense to the alleged cause of action contained in the bill of complaint herein, the defendant alleges:

XV. That the bill of complaint herein does not state facts sufficient to constitute a cause of action under the Copyright Law approved March 4th, 1909, as amended.

Wherefore the defendant prays that the bill of complaint herein may be dismissed with costs, and for such other and further relief as to the Court may seem just and proper.

THE SHANGLEY COMPANY,
By GILBERT, LAUTERSTEIN AND GILBERT,
Solicitors, No. 43 Exchange Place, Borough of Manhattan, New York City.

STATE OF NEW YORK,
City and County of New York, ss:

John J. Moran, being duly sworn, deposes and says: That he is the Secretary of The Shanley Company, a domestic corporation, the defendant in this action; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JOHN J. MORAN.

Sworn to before me this 22nd day of April, 1915.
A. MURRY ROSENTHAL,
Notary Public, New York Co., No. 211.

Filed U. S. D. C.—S. D. of N. Y.—April 29, 1915.

31 *Affidavit in Opposition to Motion for an Injunction.*

District Court of the United States, Southern District of New York.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL and G. SCHIRMER, Inc., Complainants,
against
THE SHANLEY COMPANY, Defendant.

SOUTHERN DISTRICT OF NEW YORK,
State of New York, City and County of New York, ss:

John J. Moran, being duly sworn, deposes and says: I am an officer of the defendant, The Shanley Company, to wit, the Secretary thereof, and I am general manager of the business conducted by the defendant.

The defendant conducts a hotel and restaurant known as "Shanley's" on Broadway between 43rd and 44th Streets, in the Borough of Manhattan, City of New York. The restaurant is on the ground floor and is used as any high class restaurant in the city is used, to wit, for the purpose of serving food and drink to patrons who pay the price therefor. No charge is made for admission to said restaurant or for the privilege of listening to any performance of music therein, and the only remuneration received by the defendant
32 from any of the patrons who enter said restaurant is from the sale of food and drink that is ordered by the said patrons. There is no rule requiring the patrons to order or pay for a minimum amount of food or drink. A person who only desires a sandwich has as much right to enter said restaurant and receives as much attention from the management thereof as a person who desires to order an elaborate meal.

In the said restaurant is erected a platform on which platform an orchestra is seated at certain hours of the day during which a musical program is given for the benefit of the patrons of the restaurant. This platform is not a stage. It has none of the appurtenances that are necessary parts of a stage, that is to say, it has no foot lights, side lights, border lights, scenery, wings, curtain or flies. No theatrical performance is given in the premises. None of the singers who appear ever appear in any costume other than the ordinary conventional evening dress costume. None of the songs that are sung are ever sung in character. Shanley's restaurant serves about twenty-five hundred (2500) people each day. The musical entertainment is, however, only given during limited hours. At the lunch period, to wit, from about noontime to 2 P. M. the orchestra plays. From

six o'clock until closing time at about 1:30 A. M. the orchestra plays, and at intervals during that time singers appear who sing various selections of a diversified character. Some of the songs are popular melodies, some are selections from the operas, and some are musical compositions of a little bit higher musical quality than the popular songs and yet not part of a musical composition as important as an opera.

33 The musical entertainment that is given in "Shanley's" is what is popularly known as a cabaret. The word "cabaret" has a significance purely local in character and is to be distinguished entirely from what is known as a "cabaret" in Paris. In Paris the word "cabaret" was intended to mean a volunteer performance given by patrons of a restaurant or cafe, while in New York the word "cabaret" has been extended to include every form of musical entertainment that may be given in a restaurant. The form of musical entertainment now given in Shanley's restaurant is the same kind of entertainment that has been given in restaurants for many years past. The character of the entertainment now given is somewhat more elaborate than was given in restaurants fifteen or twenty years ago, but in substance it is the same. The music, however, was never the principal business of a restaurant keeper. It has always been and now is purely incidental to the restaurant business, and the price charged for food and service is the same without as with the music.

I have read the affidavits of John Leffler, Samuel W. Tannenbaum and Victor Herbert, on which the application for an injunction pendente lite is made, and I have also read the bill of complaint. It is true that, as stated in the bill of complaint and in the affidavits, the song "Sweethearts" published by G. Schirmer, Inc., and referred to in the bill of complaint and the moving affidavits was sung in Shanley's restaurant on April 1st, and on other occasions. This song was sung on those occasions by a young lady who was not an actress; who had never been employed in a theatrical production; who never appeared on the stage; and who is not what is known as an actress. At the time she sang this song she did not sing it as a part of the

34 dramatico-musical composition known as "Sweethearts." The song "Sweethearts" as sung by her is published as a separate musical composition by G. Schirmer, Inc., in the form ordinarily known as sheet music form, and the song as so published is a complete musical composition in itself. I annex hereto a copy of the lyric from which the Court can see that the song "Sweethearts" as published in sheet music form is not in itself a dramatico-musical composition but conveys a love theme entirely apart from any dramatic story. The said song "Sweethearts" was sung in the defendant's restaurants for the purpose of the entertainment of the guests then dining in said restaurant. No admission was charged to any of such guests to hear the said song or any other music in said dining room.

I deny the allegation contained in the affidavit of John Leffler that the restaurant premises conducted by the defendant are adopted for and used for the entertainment of the general public other than in the limited way that a restaurant is said to be for the entertainment of the people who desire to dine there.

The advertisement attached to the affidavits stating that a cabaret consisting of twenty acts is given, does not indicate, nor was it intended to indicate, that a theatrical performance is given in the restaurant. Each singer is known as an act and instead of stating that twenty singers are employed in the restaurant, it is stated that twenty acts are given there. The word "act" as used in the advertisement is entirely different from the word "act" as used in the theatrical profession.

I deny the statement contained in the affidavit of John
35 Leffler that the cabaret was one of the principal attractions and features of the defendant's business. As I have already stated, the principal attraction of the defendant's business is the serving of food in an attractive manner and at popular prices.

The defendant corporation has been in existence over ten years and during all of that time has been engaged exclusively in the restaurant business. Prior to that time, however, the Messrs. Shanley who are the principal stockholders in the defendant corporation were engaged in the restaurant business for at least fifteen years. In fact, the name "Shanley" in the City of New York has been so well known in connection with the restaurant business that when the name "Shanley" is mentioned it is understood to mean one of the Shanley restaurants.

I deny the statements contained in the affidavit of Victor Herbert and in the bill of complaint that the singing of the song "Sweethearts," complained of herein, in the defendant's restaurant in any way injures the artistic reputation of the said musical composition or deprives the composer or publisher of such musical composition of any profit, or that the complainants' rights in said musical composition *is* being diminished by reason of the singing of said song in the defendant's restaurant, or that the complainants are in any way damaged by reason thereof.

As a matter of fact, for the last twenty years in which I have been engaged in the restaurant business, and particularly in the last few years, the practice has been almost universal for composers and music publishers to pay the leaders of orchestras and singers in res-
36 taurants to sing and perform their compositions, because in that manner their compositions were heard by many thousands of people each week thus adding to their reputation and to the popularity of the musical composition in a manner that could not be accomplished in any other way, and ultimately increasing the sale of such musical composition. It is a matter of common knowledge that up to within six months prior to the beginning of this action, the people who are engaged by the defendant to sing were paid by music publishers and composers to sing their songs. In fact, the young lady who sang the song "Sweethearts" on the night mentioned in the bill of complaint and moving affidavits has to my knowledge frequently received as much as $50 from a musical publisher for singing one of the songs published by him, and most of the other people who are engaged in singing in restaurants up to within the last few months always understood that as part of their perquisites in addition to the salary paid to them by the proprietor of the res-

taurant they were entitled to and did receive money from composers and music publishers for singing musical compositions, thus giving these musical compositions advertising that could not be obtained in any other way. At no time has the rendition of any musical composition in any restaurant ever interfered with the giving of a dramatico-musical composition in a theatre of which the said song might have been a part.

The song "Sweethearts," as I have already stated, is published in sheet music form separate and apart from the dramatico-musical composition known as "Sweethearts." The young lady who sang the song "Sweethearts" had purchased a copy thereof which
37 was on sale to the general public in the music stores in the City of New York, and similar copies of said song "Sweethearts" are now on sale in the music stores of the City of New York and can be purchased by any one.

I am informed and verily believe that the said song "Sweethearts" referred to in the bill of complaint was copyrighted as a separate musical composition apart and distinct from the dramatico-musical composition known as "Sweethearts."

JOHN J. MORAN.

Sworn to before me this 22nd day of April, 1915.

A. MURRY ROSENTHAL,
Notary Public, New York Co., No. 211.

Exhibit Annexed to Affidavit of John J. Moran.

Sweethearts.

If you ask where love is found,
The sort of love that's fond and true,
I will bid you look around;
It may be very near to you.
Sometimes love is very trying,
But you really must not mind it;
If it comes not to your sighing,
There is always one place you may find it;

38 Seek the dwelling of two happy sweethearts,
You will find it there!
Sweethearts make love their very own,
Sweethearts can live on love alone,
For them the eyes where love-light lies
Open the gates to Paradise!
All other love is doomed to fade,
It is like sunshine veiled in shade.
Such joys of life as love imparts
Are all of them yours, sweethearts!

Love that's real will come to stay,
And ev'ry kiss will feed the flame;
Love that lingers for a day
Is most unworthy of the name.
When it softly comes a-stealing
To your heart, then you will know it.
You may fight against revealing,
But a word, a sigh, a glance, will show it.
Still if you but love like other sweethearts,
You have naught to fear.

Sweethearts make love their very own,
Sweethearts can live on love alone,
For them the eyes where love-light lies
Open the gates to Paradise!
All other love is doomed to fade,
It is like sunshine veiled in shade.
Such joys of life as love imparts
Are all of them yours, sweethearts!

Filed U. S. D. C., S. D. of N. Y., April 29, 1915.

39 *Newspaper Clippings Annexed to Affidavit of Victor Herbert.*

The Morning Telegraph, Feb. 21, 1915.

MAXIM'S

110 West 38th Street
"Always in the Lead"
Takes Pride in Announcing
Commencing

TO-MORROW NIGHT

February 22d, 1915,
at Midnight and Every Night Following,

LEA HERRICK AND PERCY ELKELES

Present the Musical Frivolity,

"KEEP MOVING."

In two Moves. Staged by Julian Alfred.
With a cast of
Broadway Principals and "Some Girls,"
Public Dancing as usual.
No charge for admission.

N. Y. Evening Telegram, April 10, 1915.

Mr. John J. Healy,
Announces the first appearance of
His Midnight Revue,

Broadway & 145 St.

"STOP! LOOK! LISTEN!"

A Musical Scamper in Two Acts.

40 With a Large Company of Clever Principals and
a Chorus of Exceptionally Pretty Girls

ON THURSDAY, APRIL 15, 1915

at 11:30 P. M., and every night thereafter in the

MAIN DINING ROOM.

M
CAFE MAXIM

110 West 38th Street.
"Always in the Lead"
42,320 Persons Have Witnessed
This Marvelous Performance
As Many Turned Away

'KEEP MOVING'

By Lea Herrick and Percy Elkeles with Frank
Crummit and a Company of Broadway
Beauties, including a Chorus of
Wondrous Beauties.

Here the opportunity is given to a man "who missed his show" to enjoy a genuine entertainment in the style of a midnight revue.

You need not hurry through your dinner. Take your own leisure, but call before midnight.

Afternoon dances daily under the personal direction of Mr. George Pierce, from 4 to 6.30.

Every Night at Midnight.
Sunday at 11.30 P. M.
Saturday Matinee, 1.30 P. M.

Luncheon, 60c.
Dinner, $1.25.
Supper a la Carte.

41 SANS SOUCI

B'way at 42 St., Tel. Bry. 3998.

Personal Direction of Mr. Gaillard T. Boag.

New Revue with sixteen beautiful girls
Dancing 3 P. M. Till Close. Cabaret Dinner $1.

N. Y. Evening Telegram, Nov. 26, 1914.

Thursdays College Night

DUTCH ROOM

Hotel Martinique.

PICTURE OF CHORUS GIRLS IN A ROW.

To-night, During Dinner and Supper An Entirely Unique and Ever-changing

VAUDEVILLE ENTERTAINMENT

By Well Known Artists
Dancing.
Broadway at 32 Street.

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42 HOTEL MARTINIQUE DUTCH ROOM.

Broadway at 32nd & 33rd Sts. New York.

A unique and ever changing

Vaudeville Entertainment

on the stage in the

Dutch Room

During Dinner and Supper.
"Something Different."

[Picture.]
Group of "Dutch Room" Girls.

43 New York Times, April 10, 1915.

REISENWEBER'S

Columbus Circle and 58th Street
Phone 9640 Columbus
Two Performances Nightly 7:30 and 11:30
Sundays 7:30 and 10:30
No Admission Fee Charged
Edna Whistler. Marie Lavarre. Sam Ash.

TOO MUCH MUSTARD

An Exceptional Table D'Hote Dinner $1.00
Served in Main Dining Room
Dance between courses. A la Carte Portions.

The Right Quintette, wonderful singing and playing Minstrels
In Main Dining Room Every Evening Five to Ten
and Sunday Noon to Ten.
Bill of Fare itemized.

New York Evening Telegram, March 10, 1915.

BUSTANOBY'S

B'way at 60 St.
39th St. near Broadway
Commencing
Monday, March 22, at 10 P. M. and every night
thereafter
Lea Herrick and Percy Elkeles
--Present—
The Midnight Musical Dream

44 "KEEP SMILING"

in two smiles; Staged by Julian Alfred. Cast includes the famous English Comedian, Fred Walton, Maud Gray of "Fads and Fancies," "Hazel Kirke," "Sweethearts," etc., and Sylvia Jason, of "Debutantes" together with our regular entertainment.
Dinner $1.50 served until 10 P. M.
Dancing. Cabaret.

"Paris in New York."

CAFÈ DES BEAUX-ARTS.

40th St. & 6th Avenue

"Really Different"

N. Y. Times, February 21, 1915.

RECTORS

Broadway and 48th Street.

Tonight and Every Night Except Saturday. The Best Table D'Hote Dinner Dansant in New York at $1.25 per Cover.
45 Most generous portions and great variety.

Served in the finest and best ventilated Ball Room in the world. After dining one can dance and watch exhibition dancing unequalled on any stage.

Best Cabaret in New York.

Vera Maxwell and John Jarrott and the Marvellous Millers.

Unequalled—Unsurpassed.

Best Cuisine and Service at Reasonable Prices.

Phone Bryant 3200 for reservations.

January New York Times.

BILLIE'S CAFE AND RATHSKELLER

727 Seventh Avenue

Entertainment Afternoon and Evening.
Vocal and Instrumental.

W. J. Gallagher, Proprietor. Bennie Doyle, Manager.

WALLICK'S RESTAURANT
Broadway and Forty-third Street.

After Extensive Alterations

WILL OPEN WITH A NEW SENSATION

Thursday Evening, Oct. 29th at Six O'Clock

Quality, Increased Portions and Decreased Prices.

Big Show Including Several European Entertainers.

Dancing in the Poppy Room. Best Music in New York.

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46 THE BILTMORE

Announces

THÈS DANSANTS

Every Tuesday, Thursday and Saturday afternoon from four until six o'clock in the ball room and

Dinner Dances every Tuesday evening at eight o'clock in the ballroom.
Supper Dances every evening in Main Dining Room after 10:30 o'clock.

Mrs. A. M. Thackara, Jr., and Holland B. Judkins under the direction of Mrs.

A. M. Thackara, Jr.

Beginning

Monday Nov. 10 and continuing every Monday, Wednesday and Friday afternoon

Maurice and Miss Florence Walton

will give exhibition dances in the ballroom from four until six o'clock under the direction of Mrs. A. M. Thackara, Jr.

47 N. Y. Times, Feb. 25, 1915.

Now Nightly at Supper.
(Picture of man and woman dancing.)

DUQUE and GABY

CAFE des BEAX ARTS.
80 West 40th Street.
Thursday, Feb. 25
Tango Night.

The Revue, Feb'y 6, 1915.

HOTEL BRESLIN
Broadway and 29th Street, New York.

Newly Opened.
Green Room: Tea and Dinner Dancing Four to Nine P. M.
Under Direction of Mr. & Mrs. Rowley Downes, Late of Rector's and Casino Narragansett Pier.
Service a la Carte.
It's Jes' Down Yonder.
Dixie Room. Exceptional Dinner De Luxe, $1.25.
6.00 P. M. to 8.30 P. M.
Music and Vocal Entertainment During Dinner. Southern Specialties.

Music by Mr. Arthur M. Kraus, composer of Meadowbrook Fox Trot.

48 PERSIAN GARDEN

Nightly at 10:30—Thé Dansants Sats.

Exhibition Dancing by
Ida Adams and Nigel Barrie.

Next Monday—"The Only Girl" Night.

"CHEZ" MAURICE
Formerly Palais De Danse

Nightly 10:30 to Closing, inc. Sunday

50th St. & B'way
Phone 9260 Col.

MAURICE AND FLORENCE WALTON

Mon. & Thurs.—Louis XVI. Nights—Valse by Caruso.
Tuesday & Friday "Apache Nights."
Fine Band Exquisite Cuisine

A Bracing Ride—A Jolly Dinner—A Round of Golf—A Merry Dance

HUNTER ISLAND INN

15 Miles from 59th St. on the Pelham Shore Road

PELHAM BAY PARK
(Overlooking the Sound)

Cuisine, Service and Surroundings—All that the Most Exacting Could Desire. Cup Contest Every Tuesday.

A. E. MACLEAN.

49 CASTLES IN THE AIR

Atop the 44th Street Theatre
Telephone, 5935 Bryant.
Nightly at 11 P. M. Admission $1.

MR. & MRS. VERNON CASTLE

Daily Teas at 5, no admission.

On Saturdays (Mr. & Mrs. Castle Dancing)
Admission $1, Including Tea.

Town Topics.

Announcement
HOTEL KNICKERBOCKER GRILLE ROOM

Now Open
Dancing Supper
From 11 P. M. to 2 A. M.

Special Vocal and Instrumental Concerts
Main Restaurant, Sunday Evenings.
Beginning Sunday Oct. 11, 1914.

James B. Regan.

50 HOTEL IMPERIAL

Broadway, Thirty-first to Thirty-second Street

Dancing

Daily (Sunday excepted) in the Palm Garden Tango Tea
4 to 6.30 P. M.
Supper Dance 10 P. M. to 1 A. M.
With service a la carte or selected menu, $1.00.
Exhibitions of all the new society dances.

Irresistible dance music, excelling any other in New York, by the celebrated Imperial Orchestra, increased by drums and Hungarian cymbals.

Hotel Imperial.

N. Y. Times, February 28, 1915.

To-day at the tea hour at

CHIRO'S

Mr. Jay Clancy will begin a series of Saturday afternoon exhibitions of the newest of the new dances. His own version of the Lulu Fado will be shown to-day.

An exceptionally delicious luncheon is served daily from one until two-thirty. High tea is from four until half after six. There is dancing at both times.

For tables telephone Murray Hill 6488

Six East Forty-six Street.

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51 The Evening Sun, April 10, 1915.

Sunday dinner at

HOTEL MARTINIQUE

Broadway at 32d & 33d Sts.,

The House of Taylor.

Served in Louis XV Dining Room and also in Dutch Room from 6 to 9 P. M.

Vocal and Instrumental Music in Louis XV Dining Room.

Menu.

High Class Vaudeville Entertainments of Twenty-two Numbers in the Dutch Room.

Tables can be reserved in advance. Phone Madison Sq. 8000

Filed U. S. D. C.—S. D. of N. Y., April 29, 1915.

52 *Stipulation as to Certain Facts.*

District Court of the United States, Southern District of New York.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, INC., Complainants,
against
THE SHANLEY COMPANY, Defendant.

For the purpose of this action it is hereby stipulated as follows:

That an arrangement for the high voice of the vocal number entitled "Sweethearts" from the Comic Opera "Sweethearts," referred to in the bill of complaint, was separately copyrighted as a musical composition, and that copies of said vocal number in the form annexed were sold by S. Schirmer, Inc., to all persons desiring to purchase the same. That a copy of said vocal number is hereto annexed, marked Exhibit C.

That a selection containing all the numbers from the Comic Opera "Sweethearts" arranged for the piano, including the waltz song "Sweethearts," referred to in the bill of complaint, was separately copyrighted as a musical composition and that copies of said selection were sold by G. Schirmer, Inc., to all persons desiring to purchase the same. That a copy of said selection is hereto annexed, marked Exhibit D.

53 That the said selection, containing all of the numbers from the Comic Opera "Sweethearts," including the waltz song "Sweethearts" referred to in the bill of complaint, was orchestrated and arranged for performance by bands and orchestras and that copies of said orchestrations were sold by G. Schirmer, Inc., to all persons desiring to purchase the same, including conductors and leaders of bands and orchestras. That one set of said orchestrations is hereto annexed, marked Exhibit E.

Dated, April 28th, 1915.

NATHAN BURKAN,
Solicitor for Complainants.
GILBERT, LAUTERSTEIN & GILBERT,
Solicitors for Defendant.

Filed, U. S. D. C.—S. D. of N. Y., April 29, 1915.

EXHIBIT C.

Sheet Music Song "Sweethearts."

(Here follows sheet music marked page 54.)

CHARTS

TOO

LARGE

FOR

FILMING

55 EXHIBIT D.

Selection containing all the numbers from the Comic Opera "Sweethearts, arranged for the piano, including the waltz song "Sweethearts" to be submitted to the Honorable Judges of the U. S. Circuit Court of Appeals, upon the argument of the appeal.

EXHIBIT E.

Set of Orchestrations of the numbers of Comic Opera "Sweethearts" arranged for performance by bands and orchestras to be submitted to the Honorable Judges of the U. S. Circuit Court of Appeals, upon the argument of the appeal.

Stipulation as to Entry of Final Decree.

District Court of the United States, Southern District of New York.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, INC., Complainants,
against
THE SHANLEY COMPANY, Defendant.

It is hereby stipulated that this cause is submitted to Hon. Learned Hand, District Judge for final decision upon the bill of com-
56 plaint, answer, the stipulation dated the 28th day of April, 1915, and the affidavits submitted on the motion for a temporary injunction, and that a final decree may be entered upon the decision herein.

Dated, April 28, 1915.

NATHAN BURKAN,
Solicitor for Complainants.
GILBERT, LAUTERSTEIN & GILBERT,
Solicitors for Defendant.

Filed U. S. D. C.—S. D. of N. Y., April 29, 1915.

Opinion of Hand, J.

United States District Court, Southern District of New York.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, INC.,
against
THE SHANLEY COMPANY.

The plaintiffs are together the authors of a comic opera, "Sweethearts," of which Herbert composed the music and the other three

individual plaintiffs wrote the words. This has been performed in New York and elsewhere, and the words and music together
57 have been printed by the corporate plaintiff G. Schirmer, Inc., which took out a copyright upon the whole opera and upon various pieces musical compositions. The plaintiff Harry B. Smith also took out a copyright upon the libretto of the opera, in so doing complying with all formalities necessary to procuring a copyright as a dramatic composition.

The defendant owns and keeps in the City of New York a restaurant with a large dining room on the ground floor, in the centre of which it has erected a stage without proscenium, wings or backdrop. Upon this stage during the evenings and while the guests are eating actors and singers appear who sing songs to the accompaniment of an orchestra, and who at times accompany the songs with dancing. This is called a "cabaret." The defendant charges no admission to the dining-room, and gets its profit from the food and drink sold to the guests while they listen to the performance.

In the opera, "Sweethearts," appears a solo with chorus, entitled "Sweethearts," with orchestral accompaniment, the words and music being separately published by G. Schirmer, Inc., and copyrighted as a musical composition. The defendant employed a singer who had purchased a copy of this song from G. Schirmer, Inc., to sing it to the accompaniment of a small orchestra. The performance was without chorus, not in costume and without any further effort to reproduce the opera than is involved in singing the words and music.

The plaintiffs move for an injunction on the theory that the performance infringed the copyright of the dramatico-musical composition.

NATHAN BURKAN,
For the Plaintiffs.
FRANCIS GILBERT,
For the Defendant.

58 LEARNED HAND, *D. J.:*

That the opera was a dramatico-musical composition seems to me to admit of no question; a performance need not, therefore, be "for profit" to infringe under the rule in Church Co. vs. Hilliard, decided by the Circuit Court of Appeals for the Second Circuit February 9, 1915. Furthermore, a performance in words and music alone infringed the dramatico-musical copyright, for words and music alone may constitute a dramatic performance. Russell vs. Smith, 12 Q. B. 217, and it did not matter that the performance was only of a scene or part of a scene. Brady vs. Daley, 83 Fed. R., 1007. So far the case is all with the plaintiffs.

However, the authors took out a copyright upon the song separately as a musical composition, and in so doing they necessarily gave into the public domain all musical rights except as they were covered by the resulting copyright. Whatever be the minimum of musical rights, it includes the right to perform the music publicly without any unnecessary accessories. Singing the words to the music, accompanied by the orchestra, is therefore within the musical

rights so dedicated. On the other hand we now have it on the authority of Church Co. vs. Hilliard, supra, that a public performance of this kind is not within the statutory copyright which the plaintiffs received as consideration for their dedication. It seems necessarily to follow that the performance did not infringe.

This result no doubt involves the abandonment of some rights, secured by the dramatico-musical copyright, but that is because the plaintiffs wished a double protection. There can be no justice in preserving their dramatic rights at the expense of the public's
59 rights arising from taking out a musical copyright. Had they wished to retain a complete dramatic monopoly, they had it in their power to do so. As it is, that monopoly remains to their complete protection except so far as its limitation is necessary to give full scope to the musical copyright. For instance, if the performance here had been anything beyond the least essentials to a musical reproduction of the copyrighted song, it would be protected, but it was not. The plaintiffs are really trying to eat their cake and have it; they would get the full benefit of a musical copyright, while they prevent the public from enjoying the corresponding rights.

The motion is denied.

May 1, 1915.

—— ——, *D. J.*

60 *Decree.*

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the United States Post Office Building, in the Borough of Manhattan, City of New York, on the 5th day of May, 1915.

Present—Hon. Learned Hand, District Judge.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, INC., Complainants,
against
THE SHANLEY COMPANY, Defendant.

This cause having duly come on to be heard before Hon. Learned Hand, a Judge of this Court, upon the bill of complaint, answer, the affidavits of John Leffler, Samuel W. Tannenbaum, Victor Herbert and John J. Moran submitted on the motion for a temporary injunction and the stipulations made herein dated the 28th day of April, 1915, and the exhibits annexed to the bill of complaint, to the affidavits of Victor Herbert and John J. Moran, and to said stipulations, and Nathan Burkan, of counsel for the complainants, having been heard on the part of the complainants and Francis Gilbert, of counsel for the defendant, having been heard on the part of the defendant, and due deliberation having been had, it is

61 Ordered, adjudged and decreed that the bill of complaint herein be and the same is hereby dismissed.

LEARNED HAND,
District Judge.

We hereby consent to the form of the foregoing decree.

Dated, New York, May 1st, 1915.

NATHAN BURKAN,
Solicitor for Complainants.
GILBERT, LAUTERSTEIN & GILBERT,
Solicitors for Defendant.

Filed U. S. D. C.—S. D. of N. Y., May 5, 1915.

Petition and Order Allowing Appeal.

District Court of the United States, for the Southern District of New York.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, INC., Complainants,
against
THE SHANLEY COMPANY, Defendant.

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

62 Victor Herbert, Harry B. Smith, Robert B. Smith, Fred de Gresac Maurel, and G. Schirmer, Inc., the complainants above-named, conceiving themselves aggrieved by the decree of this Court made and entered in the above-entitled action and filed in the office of the Clerk of this Court, on the 5th day of May, 1915, hereby appeal from said decree to the United States Circuit Court of Appeals for the Second Circuit and state that their reasons for said appeal are specified in the assignment of errors filed herewith, and therefore pray that this appeal may be allowed and a citation granted, directed to the above-named defendant, The Shanley Company, commanding it to appear before said Circuit Court of Appeals and to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record and of the proceedings and the papers upon which said decree was made, after due authentication, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated, New York, May 12, 1915.

NATHAN BURKAN,
Solicitor for Complainants-Appellants,
165 *Broadway, Borough of Manhattan, New York City.*

It is ordered that said appeal be allowed as prayed for this 13th day of May, 1915.

J. M. MAYER,
United States District Judge.

Filed U. S. D. C., S. D. of N. Y., May 14, 1915.

63 *Assignment of Errors.*

District Court of the United States for the Southern District of New York.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, INC., Complainants,
against
THE SHANLEY COMPANY, Defendant.

The above named complainants, Victor Herbert, Harry B. Smith, Robert B. Smith, Fred de Gresac Maurel and G. Schirmer, Inc., having appealed to the United States Circuit Court of Appeals for the Second Circuit from the final decree of this Court dismissing the bill of complaint, made and entered in the above-entitled cause and filed in the office of the Clerk of this Court, on the 5th day of May, 1915, respectfully allege and make the following assignment of errors herein:

1. The Court erred in holding that the defendant did not infringe the copyright of the complainants in the musical drama or opera entitled "Sweethearts" and the rights secured by said copyright as defined by Section 1, subdivision *d* of the Copyright Act of 1909, by causing, without complainants' consent, an important and material part of said musical drama, to wit: the vocal number "Sweethearts,"
64 to be performed by a singer and by an orchestra of musicians employed by the defendant on a stage in defendant's dining room in the manner shown by the bill of complaint, answer and proofs herein.

2. The Court erred in holding that the complainants by separately copyrighting as a musical composition the said vocal number entitled "Sweethearts," an important and material part of said copyrighted musical drama "Sweethearts," dedicated to the public all musical rights in said vocal number except such as were covered by the separate copyright acquired in said vocal number.

3. The Court erred in holding that the complainants by separately copyrighting as a musical composition the said vocal number entitled "Sweethearts," an important and material part of said copyrighted musical drama "Sweethearts," dedicated to the public their dramatic performing rights under Section 1, subdivision *d*, in that part of said musical drama consisting of the words and music of said vocal number entitled "Sweethearts."

4. The Court erred in holding that the performance of said vocal number "Sweethearts," a material and important part of said mu-

sical drama "Sweethearts," by the defendant, without the complainants' consent, in a place of public accommodation and entertainment, to wit, in defendant's dining room, on a stage erected therein, such performance being given as part of an entertainment for the amusement of the patrons of the defendant's restaurant purchasing and partaking of food or refreshments therein, and which entertainment was publicly advertised as one of the features of the service offered by the defendant to its patrons, was not a public performance
65 of said vocal number for profit within the meaning of Section 1, subdivision *e*, of the Copyright Act and was not a violation of complainants' exclusive right under the Copyright Act to perform said musical composition publicly for profit.

5. The Court erred in dismissing the bill of complaint.

Wherefore, the complainants pray that the said decree of dismissal be reversed.

NATHAN BURKAN,
Solicitor for Complainants-Appellants,
165 *Broadway, Borough of Manhattan,*
New York City.

Filed U. S. D. C., S. D. of N. Y., May 14, 1915.

Citation.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to The Shanley Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Second Circuit, to be held in the Post Office Building, in the Borough
66 of Manhattan, City of New York, on the 11th day of June, 1915, pursuant to an appeal filed in the office of the clerk of the United States District Court for the Southern District of New York, wherein Victor Herbert, Harry B. Smith, Robert B. Smith, Fred de Gresac Maurel and G. Schirmer, Inc., are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the decree in said appeal mentioned should not be reversed and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Julius M. Mayer, Judge of the District Court of the United States, District of New York, this 13th day of May, 1915.

J. M. MAYER,
District Judge.

Filed U. S. D. C., S. D. of N. Y., May 15, 1915.

Admission of Service of Citation.

Copy received.

GILBERT, LAUTERSTEIN AND GILBERT.

May 14, 1915.

67 *Stipulation as to Record and Exhibits.*

United States District Court, Southern District of New York.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, INC., Complainants,
against
THE SHANLEY COMPANY, Defendant.

It is Hereby Stipulated by the solicitors for the respective parties hereto that the record for the appeal in the above-entitled action from the judgment of the District Court of the United States for the Southern District of New York, entered in the office of the Clerk of said court on the 5th day of May, 1915, shall consist of the following papers: Subpœna and proof of service thereof; bill of complaint and exhibits annexed thereto; order to show cause for an injunction and affidavits of John Leffler, Samuel W. Tannenbaum and Victor Herbert annexed thereto, and the newspaper clippings annexed to the affidavit of Victor Herbert; the answer of the defendant; the affidavit of John J. Moran; the stipulation entered into by the solicitors for the respective parties admitting certain facts herein, dated April 28th, 1915, and the exhibits annexed to said stipulation; the stipulation entered into between the solicitors for the respective parties hereto stipulating that a final decree be
68 entered upon the decision of the motion for a temporary injunction and dated April 28th, 1915; the opinion rendered herein by Hon. Learned Hand, District Judge; the decree entered herein on the 5th day of May, 1915; the petition of appeal and the order allowing the same; the assignment of errors; the citation and admission of service thereof; this stipulation; and the certificate of the Clerk of this court as to the correctness of the transcript of the record.

It is Further Stipulated that the printing of the bond on said appeal is hereby waived.

It Is Further Stipulated that the printing of Exhibits D and E annexed to the stipulation dated April 28th, 1915, is hereby waived, and that the said exhibits be submitted to the Honorable Judges of the U. S. Circuit Court of Appeals upon the argument of this appeal; and It Is Further Stipulated that the original advertisements referred to in the affidavit of Victor Herbert annexed to the notice of motion for an injunction be submitted to the Honorable Judges of the Circuit Court of Appeals upon the argument of this appeal.

Dated, New York, June 2nd, 1915.

NATHAN BURKAN,
Solicitor for Complainants-Appellants.
GILBERT, LAUTERSTEIN & GILBERT,
Solicitors for Defendant-Respondent.

Filed U. S. D. C., S. D. of N. Y., June 4th, 1915.

69 *Stipulation of Record.*

United States District Court, Southern District of New York.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, INC., Complainants,
against
THE SHANLEY COMPANY, Defendant.

It Is Hereby Stipulated And Agreed that the foregoing record is a true and correct transcript of the record and proceedings had herein and may be certified by the Clerk of the Court and filed in the office of the Clerk of the Circuit Court of Appeals.

Dated, New York, July 6, 1915.

NATHAN BURKAN,
Solicitor for Complainants-Appellants.
GILBERT, LAUTERSTEIN & GILBERT,
Solicitors for Defendant-Respondent.

70 *Order as to Record on Appeal.*

United States District Court, Southern District of New York.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, INC., Complainants,
against
THE SHANLEY COMPANY, Defendant.

Upon reading the stipulation dated June 2nd, 1915, and filed June 4th, 1915, between the parties hereto as to the contents of the record on appeal in this case, and upon examination of the printed transcript of the record agreed upon by the parties and submitted to the Clerk for certification pursuant to the said stipulation, the said record is hereby approved and the Clerk is ordered to certify the same accordingly.

Dated, New York, July 8, 1915.

LEARNED HAND,
U. S. D. J.

71 *Clerk's Certificate.*

United States of America, Southern District of New York.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, INC., Complainants,
against
THE SHANLEY COMPANY, Defendant.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do

hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto Affixed, at the City of New York, in the Southern District of New York, this 9th day of July, in the year of our Lord one thousand nine hundred and fifteen, and of the Independence of the said United States, the one hundred and fortieth.

[SEAL.] ALEXANDER GILCHRIST, JR., *Clerk.*

18067.

72 United States Circuit Court of Appeals for the Second Circuit.

No. 83, October Term, 1915.

Argued December 9, 1915. Decided January 11, 1916.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, INC., Claimants-Appellants,
against
THE SHANLEY COMPANY, Defendant-Appellee.

Appeal from the District Court of the United States for the Southern District of New York.

Before Lacombe, Coxe and Rogers, Circuit Judges.

Nathan Burkan, Of Counsel for Appellants;
Gilbert, Lauterstein & Gilbert, Solicitors for Respondents,
Francis Gilbert, Of Counsel.

This cause comes here on appeal from a decree of the United States District Court for the Southern District of New York dismissing the bill of complaint.

The facts are stated in the opinion.

73 ROGERS, *Circuit Judge:*

This was a suit brought to protect a copyright. It is alleged that on April 2, 1913, G. Schirmer, Inc., having been duly authorized by the authors to do so, copyrighted a dramatico-musical composition entitled "Sweethearts;" and that the right to copyright the composition was granted subject to the condition that the performing right should belong to the other complainants who were the authors of the composition. Thereafter a separate copyright was taken out by G. Schirmer, Inc. of the vocal number "Sweethearts." This second copyright is upon words and music which are a component part of the previously copyrighted dramatico-musical composition similarly entitled. It is alleged to be the leading vocal number of the composition and the success and popularity of that opera is said to be largely due to this particular vocal number.

Those of the complainants in whom is vested the performing right in this dramatico-musical composition entered into an agreement with certain theatrical managers and producers to perform it upon the public stage and preparations were made for its extensive production, sceneries, costumes, accessories and other paraphernalia being provided. Artists were secured to render it and booking contracts were entered into for its public performance in a theatre in New York City, and it has been so performed for a considerable period. It is claimed that the composition has been a great financial and artistic success and has attained great popularity with the public.

The defendant company maintains a restaurant and place of public entertainment in New York City, and is said in the complaint to have caused the separately copyrighted song to be sung by professional singers upon a stage in the dining hall on its premises, accompanied by an orchestra and it is charged that it proposes to continue the unlawful and wrongful performance. And the complaint avers that the vocalists and orchestra are engaged by the defendant to perform and play upon the premises for compensation; that these performances are open to the public and are not given for a
74 charitable, religious or educational purpose but for the purpose of defendant's business and as part of the service rendered to the patrons of its establishment and who purchase and partake of refreshments; that this use of the song is without the permission of the complainants and against their will and amounts to an infringement of the copyright; that the rendering of the song is a part of a theatrical entertainment given by the defendant upon its premises for the entertainment and amusement of its patrons, and for the purpose of attracting them; that the performers are under the pay of the defendant and that the entertainment thus offered to the public costs the defendant $1,000 each week.

The answer admits that the defendant through its servants and employees caused to be sung in its restaurant the vocal selection known as "Sweethearts." It states that the song is published in sheet music form, and published and sold separately and not as a part of any dramatico-musical composition. It admits that the persons singing the song receive compensation therefor from the defendant. It avers that no charge for admission is made to the patrons of its restaurant or for the privilege of listening to any performance of music therein; that no additional charge is made for meals furnished in the restaurant at the time when such music is performed over the charge made when no music is performed; that the musical composition mentioned in the complaint is not performed by the defendant or caused to be performed by it publicly for profit; that the musical composition entitled "Sweethearts" is published in sheet music form and copyrighted separately and apart from any dramatico-musical composition and as so published was offered for sale and sold to defendant and the public generally; that by virtue of its purchase of the song so published and sold defendant was authorized to cause the same to be performed in its restaurant in the manner stated. The answer was accompanied by an affidavit made by the

secretary of the defendant company. It appears from that that in the restaurant is erected a platform on which an orchestra is seated at certain hours of the day during which a musical program is
75 given for the benefit of the patrons; this platform is not a stage and has none of the appurtenances that are necessary parts of a stage; no foot lights, side lights, border light, scenery, wings, curtain or flies; no theatrical performance is given on the premises; none of the singers who appear ever appear in any costume other than the ordinary conventional evening dress costume; none of the songs that are sung are ever sung in character. The musical entertainment is only given during limited hours; from about noon to two P. M., and from six until about 1:30 A. M. the orchestra plays, and at intervals during that time singers appear who sing various selections of a diversified character.

The sheet music of the copyrighted song is in the record. It is entitled "Sweethearts—Waltz-Song from the Comic Opera 'Sweethearts.'" There is, however, nothing on its face which shows that the Comic Opera from which it was taken was itself copyrighted.

We have to consider therefore what the law is which is applicable to this state of facts. The concrete question is whether the singing of the separately copyrighted song "Sweethearts" in a restaurant to which the public is admitted without charge infringes the complainant's copyright for the dramatico-musical composition "Sweethearts" owned by the complainants, there being nothing on the copyrighted song to show that the dramatico-musical composition from which the song was taken was itself copyrighted.

In 1831 Congress repealed the Acts of 1790 and 1802 and embodied in one statute the law relating to copyright. The Act of 1831 for the first time expressly provided for the copyrighting of musical compositions. The Copyright Act of 1909, being the law now in force and under which the complainants took out their copyright, expressly authorizes the copyright of: Dramatic or dramatico-musical compositions, and of musical compositions.

The Act gives the author of any dramatic or dramatico-musical composition who takes out a copyright thereon two distinct and separable rights. It gives him:

76 1. The sole right to print and sell copies of the words and music, and

2. The sole right to publicly perform it.

And it gives the author of a musical composition in like manner two separable rights:

1. The right to print and sell copies of the words and music:

2. The right to perform the copyrighted work publicly for profit.

The distinction therefore exists that in the case of the dramatico-musical composition the Act secures to the author the sole right to publicly perform it without reference to whether it is performed for profit. But in the case of the musical composition, so far as performance is concerned, the Act restricts the authors' exclusive right to public performance for profit.

This court has held in John Church Company v. Hilliard Hotel Company, 221 Fed., 229 (1915) that the copyright to a certain mu-

sical composition is not infringed where the music is publicly rendered in the dining room of a hotel, which is open to the guests without charge for admission. We construed the language of the Act giving to the copyright proprietor the exclusive right "to perform the copyrighted work publicly for profit if it be a musical composition," to be limited to performances where an admission fee or some direct pecuniary charge is made. We there said:

"It does not make a performance any less gratuitous to an audience because some one pays the musician for rendering it, or because it was a means of attracting custom, or was a part of the operation of the hotel."

It follows therefore that the copyright of the song publicly rendered in defendant's restaurant under the circumstances heretofore stated did not infringe the copyright secured upon that composition, assuming that a valid copyright was obtained. The conclu-
77 sion that there was no infringement makes it unnecessary to inquire whether a subsequent copyright can be obtained upon a portion of a previously copyrighted work. We express no opinion on that question.

This brings us to inquire whether the complainants can claim protection for this song under their prior copyright of the dramatico-musical composition from which it has been taken. The copyright of a dramatico-musical composition secures to the proprietor, as already stated, the exclusive right of performance, and it makes no difference whether the performance is or is not for profit. Did the complainants by publishing and copyrighting the song separately and apart from the previously copyrighted dramatico-musical composition of which it was a part lose as to the part so published the benefit of its copyright as a dramatico-musical composition? There can be no doubt that they have lost that right as to the republished part for the reason that in republishing they failed to state that the comic opera from which the song was taken was itself copyrighted. We have failed to find any such announcement printed on the music sheets of the song. In its absence the complainants cannot claim the benefit of the prior copyright. Whether if they had inserted a notice of the previous copyright they could have retained the advantages of it as to the republished song, we need not now consider.

The conclusions to which we have come are:

1. That complainants cannot claim the benefit of the copyright of the dramatico-musical composition for that portion of the composition which they republished separately and without notice of the copyright previously obtained.

2. That the copyright of the song "Sweethearts" as a separate musical composition, even if valid, is not infringed by its being rendered in a public restaurant where no admission fee is charged, although the performer is privately paid for rendering it by the proprietor of the resort.

Decree affirmed.

78 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 21st day of January, one thousand nine hundred and sixteen.

Present:

Hon. E. Henry Lacombe,
Hon. Alfred C. Cox,
Hon. Henry Wade Rogers,
Circuit Judges.

VICTOR HERBERT et al., Complainants-Appellants,
vs.
SHANLEY COMPANY, Defendant-Appellee.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with costs.

E. H. L.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

79 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Victor Herbert vs. Shanley Co. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 21, 1916. William Parkin, Clerk.

80 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 79 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Victor Herbert et al., against Shanley Company, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 17th day of February in the year of our Lord One Thousand Nine Hundred and sixteen

and of the Independence of the said United States the One Hundred and fortieth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

[United States Internal Revenue Documentary Stamp, Series of 1914, ten cents, canceled W. P.]

81 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Victor Herbert, Harry B. Smith, Robert B. Smith, Fred de Gresac Maurel and G. Schirmer, Inc., are appellants, and The Shanley Company is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,—

82 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act therein as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fourteenth day of April, in the year of our Lord one thousand nine hundred and sixteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 25,207. Supreme Court of the United States, No. 924, October Term, 1915. Victor Herbert et al. vs. The Shanley Company. Writ of Certiorari.

83 In the Supreme Court of the United States, October Term, 1915.

No. 924.

VICTOR HERBERT et al., Petitioners,
vs.
THE SHANLEY COMPANY.

Stipulation as to Return to the Writ of Certiorari.

It is hereby stipulated by counsel for the parties to the above entitled cause that the certified copy of the transcript of the record now

on file in the office of the clerk of the Supreme Court of the United States shall constitute the return of the the Clerk of the United States Circuit Court of Appeals for the Second Circuit to the writ of certiorari granted herein.

WM. J. HUGHES,
Counsel for Petitioners.
NATHAN BURKAN,
Counsel for Petitioners.
GILBERT, LAUTERSTEIN & GILBERT,
A. S. GILBERT,
Counsel for Respondents.

84 To the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari herein.

Dated New York, April 22nd, 1916.

[Seal of United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

85 [Endorsed:] 924/25207. United States Circuit Court of Appeals, Second Circuit. Victor Herbert et al. v. Shanley Company. Return to Certiorari.

86 [Endorsed:] File No. 25,207. Supreme Court U. S. October term, 1915. Term No. 924. Victor Herbert et al., Petitioners, vs. The Shanley Company. Writ of certiorari and return. Filed May 8, 1916.

FILED
MAR 30 1916
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL and G. SCHIRMER, INC.,
Petitioners,
against
THE SHANLEY COMPANY,
Respondent.

No. [redacted]427

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF THEREON.

NATHAN BURKAN,
Attorney for Petitioner.

WM. J. HUGHES,
of Counsel.

PRESS OF FREMONT PAYNE, 47 Broad St.—'Phones, 2277-78-79 Broad.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL and G. SCHIRMER, INC., Petitioners, against THE SHANLEY COMPANY, Respondent.	No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF THEREON.

TO THE SUPREME COURT OF THE UNITED STATES:

The above named Victor Herbert, Harry B. Smith, Robert B. Smith, Fred de Gresac Maurel and G. Schirmer, Inc., pray for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Second Circuit in the above entitled cause.

Questions Presented.

The questions presented are:

(1) Whether the performance of a copyrighted musical composition given by paid performers in a public restaurant for the entertainment of its patrons, as a part of the operation of the restaurant business, and for the purpose of attracting patrons, when no special charge is made to the patrons for the privilege of listening to such performance, is a "performance for profit" within the meaning of Section 1, subdivision (*c*) of the Copyright Act.

(2) Whether the proprietor of a dramatico-musical composition who first copyrights the entire work by publishing the same with notice of copyright, and thereafter and in the same year separately copyrights a vocal number thereof by publishing the same with a notice of copyright, which is in every respect identical with the notice of copyright inserted on the entire work, loses the exclusive dramatic performing right in such separately published vocal number by reason of his failure to insert on such re-publication a separate notice of the copyright in the entire dramatico-musical work.

Statement of the Case.

The vocal score of the comic opera entitled "Sweethearts" was copyrighted in the year 1913 as a "dramatico-musical composition," one of the classes specified in Section 5 of the Copyright Act. The copyright was secured by publication with the following notice of copyright, viz.:

"Copyright, 1913, by G. Schirmer."

During the same year the proprietors of said copyright separately published with notice of copyright the vocal number also entitled "Sweethearts" consisting of words and music, which is a component part of said copyrighted vocal score, and a link of the dramatic action of said comic opera. The copyright notice inserted on this separate publication is as follows:

"Copyright, 1913, by G. Schirmer."

The vocal number "Sweethearts" was copyrighted as a musical composition.

The copyrighting of the composition thus secured, so far as this case is concerned, involves two distinct rights: the public performing right as a drama under Section 1 (*d*), and the public performing right for profit as a musical composition under Section 1 (*e*).

The defendant conducts a public restaurant in the City of New York, and as a part of its business gives performances of the kind known as "cabaret" performances for the entertainment of its patrons. These performances are given on a raised platform by an orchestra and singers. No admission fee is charged for the entertainment, but it is intended for patrons, *i. e.*, for persons who purchase food or refreshment.

Under these circumstances the vocal number "Sweethearts," both the words and the music, was performed in defendant's restaurant by a singer and by musicians who were employed by the defendant.

Statutes Involved.

Section 1 of the Act of March 4, 1909, 35 Stat., 1075, provides that:

> "Any person entitled thereto, upon complying with the provisions of this act, shall have the exclusive right:
> * * * * * *
> (d) To perform or represent the copyrighted work publicly if it be a drama or,
> * * *
> (e) To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit. * * *"

Section 3 provides:

> "That the copyright provided by this Act *shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting*, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this Act."

The proviso to Section 5 is as follows:

> "That the above specifications shall not be held to limit the subject matter of copyright as defined in Section four of this Act, nor

shall any error in classification invalidate or impair the copyright protection secured under this Act."

Section 6 of the Act is as follows:

"That compilations or *abridgments,* adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain, or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this act; *but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof,* or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works."

Section 28 provides:

"That nothing in this Act shall be so construed as to prevent the performance of religious or secular works, *such as oratorios, cantatas, masses or octavo choruses by public schools, church choirs or vocal societies,* rented, borrowed or obtained from some public library, public school, church choir, school choir or vocal society, *provided the performance is given for charitable or educational purposes and not for profit.*"

Decisions of Lower Courts.

The District Court (222 Fed. Rep., 344) dismissed the complaint, holding that the dramatic performing right in the vocal number was lost by reason of its being separately copyrighted as a musical composition, and that the performing right in the vocal number as a musical composition was not infringed because the defendant's performance was not a performance "for profit."

The Circuit Court of Appeals held that the dramatic performing right existing in the vocal number as a part of the copyrighted dramatico-musical work was lost, because the separate publication of the vocal number contained no separate notice of the copyright in the entire work. Considering the vocal number as a non-dramatic musical composition, the Court also held that the defendant's performance of it was not "for profit" and, hence, no infringement.

The decree dismissing the bill of complaint was affirmed.

Reasons for the Allowance of the Writ.

(1) Under this decision the owners of copyrighted operas and other musical compositions will lose the benefit of their copyrights by reason of a new and widely practiced form of appropriating such works.

The giving of "cabaret" entertainments which include the rendition of copyrighted musical compositions and of portions of copyrighted operatic works, has become a regular feature of the opera-

tion of restaurants and hotels. These entertainments are advertised in the public press as parts of the service offered to the public (Rec., page 39, *et seq.*).

The importance of the question presented lies in the fact that many operas and other similar musical productions owe their success almost entirely to a few numbers which receive popular favor, so that the rendition of these numbers at public restaurants seriously interferes with the attendance at licensed performances.

The loss of the dramatic performing right in separately published numbers or selections from operas and similar works will seriously diminish the protection afforded by the copyright in such works. This loss will affect almost all owners of such copyrights, because such re-publications have been printed always with only one copyright notice and have never contained an additional notice of the copyright in the entire work.

(2) As shown hereinafter in the accompanying brief, the English courts hold that a performance such as there was in this case is a public performance for profit. Under Section 1 of the Act, and the Proclamation of the President, the work of an English author or composer is given copyright protection in the United States. A cabaret performance of a portion of his work in the United States under this decision, therefore, would not be a violation of his copyright, while a similar performance in London would be.

(3) The Supreme Court of New York has held in an analogus matter that in an "indirect way a profit was made" out of a moving picture show operated as an inducement to draw trade to an

ice cream saloon, although no entrance fee was charged to such show. See *Weistblatt* vs. *Bingham*, 58 Misc., 328. The state and federal courts, therefore, are opposed in their views of the same proposition of law, thus bringing the case within the rule laid down by this Court in *Forsyth* vs. *Hammond*, 166 U. S., 506, 514, as to the "necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a State, or some matter affecting the interests of this nation in its internal or external relations," by writ of certiorari.

(4) The decision throws doubt on important provisions of the Copyright Act of 1909.

Section 6 of the Act provides that the publication as a new work of any arrangement of a copyrighted work "shall not affect the force or validity of any subsisting copyright" in any matter included in such new publication.

Sections 19 and 46 of the Act indicate that Congress intended to require only one copyright notice on one publication.

Under this decision the separate publication and copyrighting of a selection from a copyrighted opera destroys part of the subsisting copyright in the matter used, unless two notices of copyright are inserted.

(5) Article 1, Section 8, of the Constitution provides that "the Congress shall have power * * * to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

While copyright protection is thus provided by the same clause of the Constitution which gives

patent protection, it is apparent that a decision concerning the validity of a patent may affect only those interested in a particular device, but a decision in a copyright case like the one under consideration affects not only the copyright proprietor concerned, but also every other copyright proprietor of a musical composition in the United States and foreign countries similarly situated. The present decision is of peculiar public interest, therefore, in that it concerns *every* owner of a copyrighted musical composition appropriated and used in an unauthorized cabaret performance, which it holds does not infringe upon the protection given by the Act. The more popular a musical composition is, the greater its value to the composer or copyright proprietor, and correspondingly the greater temptation to appropriate it for cabaret and other similar performances. The decision, therefore, has direct bearing upon the protection of intellectual effort by authors and composers, the fostering of which was the purpose of the constitutional provision.

For these reasons, and inasmuch as this is the first case involving a construction of the provisions of the Copyright Act referred to to come before this Court, and inasmuch also as the present is a class case, instituted because it is typical in its facts of many others similar thereto, and because, it is insisted, the decisions below are in direct conflict with the express language and intent of the Act, it is submitted that a writ of certiorari should issue and the questions involved be determined by this Court.

WHEREFORE your petitioners pray that a writ of certiorari may be issued out of and under the

seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify the above cause to this Court for review and determination, as provided by law, and that your petitioners may have such other and further relief in the premises as to this Court may seem appropriate.

VICTOR HERBERT,
HARRY B. SMITH,
ROBERT B. SMITH,
FRED de GRESAC MAUREL,
G. SCHIRMER, Inc.,
Petitioners.

NATHAN BURKAN,
Attorney for Petitioners.

WM. J. HUGHES,
of Counsel.

United States of America,
State of New York,
County of New York, } ss.:

Victor Herbert, being duly sworn, deposes and says that he is one of the petitioners named in the foregoing petition, that he has read the said petition and knows the contents thereof, that the facts therein stated are true to the best of his knowledge, information and belief.

VICTOR HERBERT.

Subscribed and sworn to before me this
17th day of March, 1916.

ABRAHAM KIPP,
(Seal) Notary Public,
New York County #2001.

BRIEF IN SUPPORT OF THE PETITION.

I.

The performance of a copyrighted musical composition in a public restaurant, given as a part of the operation of such restaurant business, and for the purpose of attracting patrons, is a public performance for profit within the meaning of Section 1, subdivision e of the Copyright Act.

A. *That no direct charge is made to patrons for the performance is immaterial.*

The Circuit Court of Appeals for the Second Circuit has held that the exclusive right defined in Section 1, subdivision (e), is confined to public performances to which an admission fee or some direct pecuniary charge is exacted. A previous ruling made by the same Court in John Church Company vs. Hilliard Hotel Company, 221 Fed., 229, is reaffirmed as follows:

> "It does not make a performance any less gratuitous to an audience because some one pays the musician for rendering it, or because it was a means of attracting custom, or was a part of the operation of the hotel."

This definition of "performance for profit" is not in accord with the ordinary meaning of the words.

A person who operates a restaurant for the purpose of selling food and refreshment for pay is

commonly understood to operate his business for profit.

The record in this cause contains copies of advertisements published in the newspapers for the purpose of attracting patrons to certain popular restaurants (pages 39-51).

The owners of these establishments announce that they will sell a meal for one dollar, or for some other price stated.

The price charged is commonly understood to include a profit for the proprietor who sells it.

A restaurant proprietor who increases the number of persons purchasing his meals increases his profit.

If, for the purpose of bringing about such increase of customers, and therewith of profit, he offers some addition to the service that goes with each meal, he will be commonly understood to furnish such additional service for profit.

It is unquestionable that any increase of profit thus realized is derived from the patrons, although there is no special charge made expressly for such additional service.

For no one may enjoy the additional service unless he purchases a meal or some food or refreshments.

The question whether a performance given in conjunction with the operation of a place of public accommodation is a performance for profit was considered in the New York Supreme Court, in Weistblatt vs. Bingham, 58 Misc., 328—a case involving a motion picture exhibition given in an ice-cream saloon. Judge Crane, in his opinion, said:

> "While no entrance fee is charged for this exhibition, it is evident that it is conducted

for the purpose of drawing trade and of gathering people into the place to purchase soda or ice cream while viewing the pictures. A person who came in and occupied one of the chairs at a table, without ordering something, I imagine would not stay very long. In this indirect way a profit is made out of the moving picture show."

The question was considered in England in the case of *Sarpy* vs. *Holland*, 99 Law Times, 317. In that case the defendant Holland who conducted a hotel, employed for pay a band of musicians to play in his establishment. Cozens-Hardy, M. R., said:

"This performance was paid for by Mr. Holland, the publican, with the view of gain; it was worth his while to pay, I think, 16s. a performance. It was obviously part of the means by which he attracted customers, and hoped to gain, and did gain a profit in carrying on the business of the hotel. That being so, it seems to be impossible to contend that this was a performance at a gratuitous public entertainment. Obviously the people who went in large numbers every night went there not merely in the expectation, but with the certainty that they would not go there, and indeed, could not go there, without buying some of the commodities which Holland was there for the purpose of selling. The music was really part of the operations of the hotel."

The conclusion of the Master of the Rolls was not based on the circumstance that the musicians

were paid, but on the fact that the musical performance was part of the means by which customers were attracted and profit was gained.

When the case of *John Church Company* vs. *Hilliard Hotel Company*, *supra*, was heard in the United States District Court, Judge Lacombe took the same view as did the Master of the Rolls in *Sarpy* vs. *Holland*. His decision was as follows:

> "The circumstance that complainant could not prove any specific sum as 'profit' resulting from the playing of the copyrighted music seems to me immaterial. The place was 'public' although all the public could not gather in it and I think, as did the Judges in Sarpy vs. Holland, 99 L. T., 317, that the hotel would not have paid for the playing of the piece unless in some way or other, they were to gain thereby."

An entertainment given for the patrons of a restaurant who are admitted on the understanding that they make some purchase, is not essentially different from an entertainment to which an admission fee is charged.

The admission fee is sometimes disguised. Entertainments are given to which admission may be had on payment for a "hat-check," which entitles the holder to the cloak-room service.

If the proprietor of a dance hall furnishes the dancing floor and music without special charge, but exacts the purchase of a hat-check, is there any difference between the musical performance given by him and that given in a concert hall to which a general admission fee is charged?

The proprietor of the dance hall often sells refreshments to his patrons. He may derive more profit from the sale of refreshments than from the hat-checks and may come to the conclusion that he would attract more patrons and realize on the whole a larger profit by dropping the charge for the hat-check.

He would then admit the public without direct charge and yet he would reap an increased profit from those admitted who would all be expected to make some purchase.

Would it be a reasonable view of the musical performances given in such a dance hall to say that they are for profit while the payment for a hat-check is exacted, and not for profit when no such direct charge is made, but a purchase is "expected"—which means exacted—from the patrons?

(B) *The intention of Congress is shown in other portions of the Copyright Act.*

In construing the language of the copyright statutes, regard should be had to the intention of Congress, and to the object of copyright legislation.

The question of the scope of musical copyright is dealt with in Section 28 of the Copyright Act of 1909.

The second half of Section 28 provides, as follows:

> "Provided, however, that nothing in this Act shall be so construed as to prevent the performance of religious or secular works, such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or

> [illegible] rented, borrowed or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit."

This provision indicates the intention of Congress to limit free performances of musical works to those given for charitable or educational purposes, and of the classes above enumerated.

The clause is incompatible with any construction of section 1, sub-division e, which would permit the free production of musical works like the one here involved for purposes of business, w[illegible] might result in personal gain, whether direc[illegible] indirectly.

The copyright act as passed in 1909, w[illegible] by the Committee on Patents of the Ho[illegible] resentatives, collaborating with the Co[illegible]ctee of the Senate. When the bill in its final form was submitted to Congress, the Committee on Patents of the House of Representatives submitted a report recommending the passage of the bill. The report is dated February 22nd, 1909, and is entitled "60th Congress, 2d Session, House of Representatives, Report No. 2222." On page 16 of said Report, it is said as to the latter half of Section 28:

> "The existing law provides that any person publicly performing a dramatic or musical composition without the consent of the proprietor of the copyright shall be liable for damages of not less than $100 for the first and $50 for every subsequent performance, and this

> prohibition covers cases of public performances where the performance is not for profit. We have provided in this section that where the public performance is given by public schools, etc., for educational or charitable purposes, and not for profit, it may be done without subjecting those who give the performance to any suit for damages; and we further provide that the music used for the performance may be rented, borrowed, or obtained from public libraries or other public schools," etc.

The intention to limit free performances to the instances specified in section 28 is here clearly expressed.

As Congress concurred in the report of the joint Committee and passed the bill in the form recommended in this report, the report may be cited as some evidence of the legislative intent.

The construction of section 1, sub-division e, contended for by the petitioners, is the only construction that is in harmony with the purposes of copyright legislation as they have been long recognized.

The object of copyright legislation is to secure to the author all the benefit that may be derived from the use of his works.

Prior to 1897, composers of musical works not belonging to the class of dramatico-musical works and therefore not entitled to protection as dramatic works, were not entitled to the exclusive performing rights in such compositions.

This inequality of protection was removed by the Act of January 6, 1897, which amended Section 4966 of the Revised Statutes so as to make

it equally applicable to both dramatic and musical compositions. In White Smith Co. vs. Apollo Co., 209 U. S., at page 16, this Court speaking by Mr. Justice Day, said:

> "The purpose of the amendment evidently was to put musical compositions on the footing of dramatic compositions so as to prohibit their public performances."

The revision of the copyright laws which resulted in the passage of the present Act was taken up by Congress in response to a message of President Roosevelt, dated December, 1905, in which the defects of the then existing copyright laws were pointed out and the desirability of so revising the law as to secure the complete protection of authors was urged.

Such being the object of the revision of the copyright laws in the form of the present Act, it is reasonable to assume that Congress had no intention to take away any substantial protection previously granted to composers.

The instances mentioned in Section 28 where the performance of musical works for certain charitable and educational purposes is permitted, do not place the composer to any material extent in a less favorable position than he enjoyed under the law of 1897, because it had long been the prevailing custom to permit free use of musical works for charitable and educational purposes.

The purpose of the Copyright Law would be to a large measure defeated if the permission of free performances were extended beyond the instances specified in Section 28.

The petitioner is entitled to relief if the defendant performed the musical composition for profit. To hold that a performance as a business matter in a public restaurant operated in a business way for profit, is not for profit, simply because no particular part of the receipts of the business due to the performance is isolated or allocated, is contrary to fact. Such a holding should not be permitted, we submit, to stand as representing the law.

POINT II.

When an arrangement of a vocal number or a selection from a copyrighted operatic work is separately copyrighted by publication, a notice of the copyright in such separate number or selection is sufficient to preserve the dramatic performing right subsisting in such number or selection by reason of the copyright in the entire operatic work. The fact that in the application for registration such number is classified as a musical composition does not limit the scope of the copyright previously acquired in such number as a part of the operatic work. An additional notice of the previously acquired copyright in the entire work is not required to preserve all the rights secured by such prior copyright.

The Circuit Court of Appeals held that the proprietor of a general copyright in an operatic work

loses the dramatic performing right in any vocal number or selection therefrom separately published and copyrighted as a musical composition in case he fails to insert on such separate publication a notice stating that the entire operatic work was copyrighted.

This ruling introduces a new requirement as to notice, and a new penalty for the failure to conform to such requirement, which requirement and penalty are at variance with the language and intent of the Copyright Act.

When a composer copyrights his opera by publication, he is not required to state in his notice of copyright whether he classifies it as a dramatic work or as a musical composition. A general notice of copyright is sufficient.

Upon publication with a general copyright notice, the composer or owner of the work acquires all the rights enumerated in Section 1 of the Copyright Act (35 Stat., 1075) which are applicable to his work.

If a work is equally suitable for several of the uses and methods of reproduction mentioned in Section 1, the exclusive right to all of them is secured by publication.

And all these rights are secured before the work is classified. The owner is not required to classify his work until after the copyrighting has been effected. The specification of the class is to be made in the application for registration of the copyright (Section 5).

As all the rights mentioned in Section I have become vested in the copyright proprietor before he classifies his work, his manner of classifying it could only affect his rights by implying an aban-

donment from the selection he makes among the classes mentioned in Section 5.

But Congress expressly forbade any such implication by providing at the end of Section 5 that *"no error in classification shall invalidate or impair the copyright protection secured under this Act."*

Under this saving clause of Section 5 a composer of an opera who copyrights his work by publication and then classifies it as a musical composition, does not lose the right to claim protection for it as a dramatic work.

The same reasoning applies to a part of an opera separately published with notice of copyright, which part is classified as a musical composition.

Like the complete operatic work, a vocal number or selection taken from it may be classified as a dramatico-musical work, or as a musical work.

The fact that the composer or owner classifies it as a musical composition, cannot, under the last clause of Section 5, be held to be an abandonment of any right of protection which existed in such number or selection prior to and independent of such classification.

The decision of the Circuit Court of Appeals furthermore restricts the scope of Section 6 of the Act in a manner which is in conflict with the language and intent of the law. Section 6 provides as follows:

> "That compilations or abridgements, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain, or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished

> with new matter, shall be regarded as new works subject to copyright under the provisions of this Act; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works."

Under the above section an arrangement of a part of an opera shall be treated and may be copyrighted as a new work, and its publication shall not affect the scope of any copyright previously acquired in any matter included in such new work.

If such an arrangement is to be treated as a new work, only one copyright notice stating the year when such new copyright was secured and the name of the copyright proprietor, is required.

The same view was taken by the Circuit Court of Appeals for the Second Circuit in West Publishing Co. vs. Edward Thompson Co., 176 Fed. Rep., 833, 837, where it was said:

> "Section 6 of the Act of 1909 (Act March 4, 1909), which is obviously declaratory, seems to confirm Justice Clifford's view (in Lawrence vs. Dana, 4 Cliff., 1) that there is but one copyright of the same book, that additions and improvements make a new book, and that the only notice required is of the date of entry of the last edition."

There would be no reason for the provision in Section 6, preserving the full force of any subsisting copyright in any matter used in another

form in a new copyrighted publication, if it were intended that in such new publication notice of the prior copyright must be given.

If two copyright notices were necessary, one of the old and one of the new copyright, the copyright in the old matter as well as in the new matter, or in the new form, would be protected without Section 6.

If notices of two copyrights were required, the work would not be treated as one new work, but as an amalgamation of an old work and a new work.

In respect to the copyright notice, the intent of Congress to avoid the need of more than one notice in one publication is evident.

Section 19 provides that one notice of copyright in each volume or in each number of a newspaper or periodical shall be sufficient.

Section 46 permits the name of the assignee to be inserted in place of the original copyright proprietor, thus making unnecessary the naming of successive copyright owners.

There is also apparent a policy of guarding against the loss or abandonment of copyright by mere mistake or inadvertence. The policy is shown in the closing provision of Section 5 and also in Section 20, which provides that the omission of the prescribed notice by accident or mistake shall not invalidate the copyright.

March 17, 1916.

NATHAN BURKAN,
Attorney for Petitioner.

WM. J. HUGHES,
of Counsel.

MAR 31 1916
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL and G. SCHIRMER, Inc.,
Petitioners,

against

THE SHANLEY COMPANY,
Respondent,

No. 924 427

On Petition for Writ of Certiorari

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT.

GILBERT, LAUTERSTEIN & GILBERT,
Solicitors for Respondent.

Abraham L. Gilbert and
FRANCIS GILBERT,
Counsel.

IN THE

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Petitioners,

against

THE SHANLEY COMPANY,
Respondent,

No. .....

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Facts.

The complainants are the owners of the copyright of a dramatico-musical composition, known as the comic opera "Sweethearts." In this opera was included a vocal selection known as the waltz song "Sweethearts." After having secured a copyright on the comic opera as a dramatico-musical work, the complainants then separately copyrighted, published and sold the

waltz song "Sweethearts" as a musical composition. This song was performed in a restaurant conducted by the respondent, to which no admission was charged, and the musical entertainment given was incidental to the restaurant business.

The court below definitely decided two propositions.

1. That the copyright of the song "Sweethearts" as a separate musical composition, even if valid, is not infringed by its being rendered in a public restaurant where no admission fee is charged, although the performer is privately paid for rendering it by the proprietor of the resort.

2. That the petitioners cannot claim the benefit of the copyright of the dramatico-musical composition for that portion of the composition which they republished separately and without notice of the copyright previously obtained.

In the statements of the questions set forth in the petition the second question thereof is somewhat incorrectly stated. There is no claim made that the petitioners in separately copyrighting, publishing and selling as a musical composition a portion of a dramatico-musical work lost any future exclusive dramatic performing rights therein, nor did the court below so hold. Its conclusions were confined to the two propositions hereinbefore stated.

And in consideration of the facts as set forth in the petitioner's brief it is to be remembered that there is no claim made herein that the respondent gave a dramatic or theatrical performance of the song in question. In the record are to be found the advertisements of various hotels and restaurants, and from these advertisements it may possibly be inferred that theatrical performances are given in the places

therein specified, but no such claim was made against the respondent herein, and in fact the court below found to the contrary, because in the opinion it is stated "no theatrical performance is given on the premises. None of the singers who appear ever appear in any costume other than the ordinary conventional evening dress costume; none of the songs that are sung are ever sung in character."

The application for a writ of certiorari herein, is submitted, we believe, simultaneously with a similar application for a writ of certiorari in the case of The John Church Company against the Hilliard Hotel Company. These two cases involve closely related provisions of the Copyright Law. The Church Company case involves a construction of Section 1, Sub-division E, relating to *musical compositions;* the case at bar involves a construction of Section 1, Sub-division D relating to dramatic works and by implication to *dramatico-musical works.*

The respondent opposes the issuance of a writ of certiorari in this case for the following reasons:

The matter at issue is simple and has been exhaustively examined and clearly determined by the Circuit Court of Appeals for the Second Circuit in two separate cases, Church v. Hilliard, 221 Fed. Rep., 229, and Herbert, et al., vs. The Shanley Company (the case at bar) not yet reported.

In the Church v. Hilliard case it was held, that a performance of a copyrighted musical composition, given by paid performers in a public restaurant for the entertainment of its patrons, as a part of the operation of the restaurant, for the purpose of attracting patrons, when no charge is made to patrons for the privilege of listening to such performance, is not a performance for profit

within the meaning of Section 1, Sub-division e of the Copyright Act.

In the Herbert v. Shanley case it was held that, when the owner of a copyrighted dramatico-musical composition separately publishes, copyrights, and sells, as a musical composition, a song or other musical number which originally formed a part of such dramatico musical composition, a public performance of such musical compostion, unaccompanied by a dramatic action, does not infringe the copyright, unless it is a performance for profit within the meaning of Section 1 of Subdivision e above referred to.

POINT I.

A writ of certiorari should not issue.

A writ of certiorari should not be granted because in the present case there is involved no question of "peculiar gravity and general importance."

> Amercain Company v. Jacksonville, 148 U. S., 372.
>
> In re Woods, 143 U. S., 202, at page 206.

The petition fails to show any divergence of opinion on the questions presented herein, between two or more Circuit Courts of Appeal, or between a Federal Court and a State Court. Nor do any of the issues herein presented affect any interest of this nation. There is no dissent in the opinion of the Circuit Court of Appeals.

> Forsyth v. Hammond, 166 U. S., 514.

POINT II.

The performance of a copyrighted musical composition in a public restaurant to which no admission fee is charged and where the musical entertainment is incidental to the restaurant business, as in the case at bar, is not a performance for profit within the meaning of Section 1, Subdivision E, of the Copyright Act.

A.—As to the Meaning of the Words "for Profit."

The whole controversy herein arises over the meaning of the words "for profit." In the District and Circuit Courts, in both the Hilliard and the Shanley cases, counsel for the publishers urged, as they now urge here, that this expression means "for pay" and also "for any business purpose." This respondent, on the other hand, contends that the expression has no such broad meaning, but refers to performances to hear which an admission fee is charged, regardless of whether the performance produces a profit or is given with that purpose in view.

All parties interested in this litigation have agreed throughout that a performance where an admission fee is charged is a performance for profit.

The Copyright Act is silent as to the meaning of the words "for profit" except in Section I, referring to coin-operated machines, which provides that

> "The reproduction or rendition of a musical composition by or upon coin-operated ma-

chines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs."

Appellant urges that the performance of music is for profit because it is a part of the service in connection with the meal for which the restaurant receives pay. Music is not a necessary incident to the service of food; the guest who pays for a meal cannot insist upon having music during meals. Music is played only during certain hours, although meals are served at all hours, and the price of food and service is the same during the time when music is played as it is when the music is not furnished.

It may be assumed that the purpose for which the music is played is to attract patrons. This brings us back to the question whether the purpose with which the free performance is given, determines its character as a performance for profit in the absence of any proof as to whether the free music actually increases the patronage and the gross receipts of the restaurant from sale of food. The added profits, if any, flowing from the free performance of music, are remote, conjectural and speculative.

If it is true that every free performance of music is for profit simply because it is given in the hope of attracting trade and business or because the performers profit by reason of compensation received, then not only hotels and restaurants but many other establishments will be affected as well as the musicians themselves. Paid musicians giving a free performance of copyrighted music at any public meeting would be subject to a royalty.

Counsel for petitioner claims that no musicians or other artists who are paid to give a public performance are exempt from the provisions of the act requiring payment of royalty unless they come within the exceptions enumerated in Section 28 of the act, which provides that:

> "Nothing in this act shall be construed as to prevent the performance of religious or secular works, such as oratorios, cantatas, masses or octavo choruses by public schools, church choirs or vocal societies, rented, borrowed or obtained from some public library, public school, church choir, school choir or vocal society, provided the performance is given for charitable or educational purposes and not for profit."

If this is true the members of an orchestra who receive compensation for their services would be subject to royalty even though they gave a concert for charitable or educational purposes, because section 28 only excepts performances of specified musical works by *public schools, church choirs or octavo choruses.*

The usual free band concert given municipalities for the pleasure and edification of its citizens would require a royalty to be paid by the musicians for each copyrighted selection performed, because the musicians were compensated.

A musician employed to play or sing a piece of copyrighted music in order to attract trade and sell the music for the mutual profit of the composer and the dealer would be giving a public performance for profit and subject to royalty. In this case the absurdity of counsel's contention is forcibly illustrated because the composer would be entitled to receive three distinct royalties: 1.

From the publisher on the sale to the dealer. 2. From the dealer, because he procures a public performance for profit to be given. 3. From the musician who gives the public performance for profit.

B.—There is no Conflict Between the Federal and State Courts.

The citation by appellant of the Weistblatt case (58 Misc., 328) to support his argument that the Supreme Court of New York has held in an analagous matter that in an "indirect way a profit was made" out of a moving picture show operated as an inducement to draw trade to an ice cream saloon, although no entrance fee was charged to such show; and, therefore, that there is a conflict between the State Court and Federal Court, is misleading.

The Weistblatt case was decided by the Supreme Court at Special Term in 1908. In 1912 the Court of Special Sessions of New York County reached exactly the opposite conclusion in the case of People v. Martin, 137 N. Y. Supp., 377, which held that a cabaret show in a restaurant was not a public performance for profit, and hence required no license.

Again, in the case of People v. Wacke, 77 Misc., 196, decided by the County Court, Kings County, in June, 1912, that court held that one conducting a hotel is not guilty of violation of an ordinance which prohibits conducting a common show without a license, by exhibition in such hotel of moving pictures, no admission fee being charged. The court said, at page 300:

> "The defendant was not engaged in the moving picture business. He was conducting

a hotel and was engaged in the hotel and liquor business. He was exhibiting the pictures for the entertainment of his guests as an incident to his hotel business at the seashore. The case of People vs. Royal, 23 A. D., 258, seems to me to be decisive of the question under consideration."

In the Royal case the Appellate Division of the Supreme Court held that a person who hires a room where he illustrated tricks and devices of gamblers for the purpose of selling a book, no admission fee being charged, is not engaged in conducting an exhibition which required a license. The court said the *sale of the book*, not the exhibition, was the principal thing. So in this case, the *sale of meals*, and not the performance of music, is the principal thing and the source of profit, if any, to the hotel. In the Royal case the court said:

"It is not denied but that the word exhibition, in its broad significance, would embrace what the defendant did in this case. But it is quite evident that the word, as used in the ordinance in question, is so used in a sense much more restricted. Given its broadest signification, there are a large class of business men that use various methods to attract custom and sell their goods that would be brought within its terms. Every contrivance for the automatic movement of dumb figures, used in display windows to attract attention, every exhibit of paintings for sale or to arouse interest and to attract visitors to public marts of trade, every person exhibiting exercising apparatus through the medium of an automaton or human being, every per-

son displaying advertising matter, pictures and designs by means of a stereopticon, are a few of the very many things which would be brought within this ordinance if the word were to be construed in its general sense. The connection in which it appears in the ordinance shows that its meaning has relation to entertainments where the exhibition itself is the principal thing and from which the exhibitor derives or expects to derive profit."

All these cases, which were cited and considered by the Circuit Court of Appeals in the Hilliard case, show that the State Courts and the Federal Courts are not in conflict in regard to the principle involved in the case at bar.

C.—The Sarpy Case Distinguished.

The case of Sarpy v. Holland was followed by Mr. Justice Lacombe in granting the original injunction order which was reversed by the Circuit Court of appeals. This is the only case which the learned counsel for the publishers, both in the Hilliard case and the Shanley case, have been able to find, in their exhaustive research of the books, in support of their contention that a gratuitous performance of music is for profit if given as an incident to any business enterprise. The court decided the Sarpy case under Section 1 of the English Copyright Act of 1882, which is as follows:

"On and after the passing of this Act, the proprietor of a copyright in any musical composition first published after the passing of this Act, or his assignee, who shall be entitled to and be desirous of retaining in his own hands exclusively *the right of public*

> *representation or performance of the same,* shall print or cause to be printed upon such title page of every published copy of such musical composition a notice to the effect that *the right of public representation or performance is reserved.*"

The Sarpy case is distinguishable from the case at bar. It will be noted the English statute confers greater rights upon the composer than the American. Neither the words "for profit" nor any equivalent expression appear in the English Act; hence, any public performance, whether it is for profit or not, is an infringement. The English Act gives the copyright owner of a musical composition the same rights which the United States Copyright Act gives to the owner of a drama or dramatico musical composition.

D.—As to the Meaning of Section 28.

Although in Section 1, Subdivision E of the Copyright Act the right of the owner of the copyright is limited "to perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit," yet counsel for the petitioner contends that this provision is meaningless because of the provisions of Section 28 of the Copyright Act, which is as follows:

> "Any person who wilfully and for profit shall infringe any copyright secured by this act * * * shall be deemed guilty of a misdemeanor * * * provided, however, that nothing in this act shall be so construed as to prevent the performance of religious or secular works such as oratorios, cantatas,

masses or octavo choruses by public schools, church choirs or vocal societies, rented, borrowed or obtained from some public library, public school, church choir, school choir or vocal society, provided the performance is given for charitable and educational purposes and not for profit."

It is contended that the foregoing provision "indicates the intention of Congress to limit free performances of musical works to those given for charitable or educational purposes, and of the classes above enumerated." (Petitioner's brief, page 16). To so hold would absolutely nullify the provisions of Section 1, subdivision E, because under that sub-division a public performance of any musical composition can be given by any one if not for profit.

POINT III.

When an arrangement of a vocal number or a selection from a copyrighted dramatic work is separately copyrighted, published and sold, as a musical composition, it becomes such in law as well as in fact.

A notice of copyright in a musical composition is notice that it may not be performed publicly for profit. Section 1, subdivision E, of the Copyright Law gives no other or additional right to the copyright owner.

A separate publication, dedication and copyright of such musical composition does not necessarily forfeit any of the dramatic rights which the owner has in the same piece. He is still pro-

tected in his dramatic performing right by his copyright of the opera of which such song forms an integral part, and, as Judge Hand said in the Shanley case (222 Fed. Rep., 344):

> "If the performance had been anything beyond the least essentials of a musical reproduction of a copyrighted song, it would be protected; (that is against any public performance, regardless of whether it was for profit), but it was not."

There can be no two opinions as to the intent of Congress to distinguish sharply between dramatic works and musical compositions. While it is true that Section 5 provides that "no error in classification shall invalidate or impair the copyright protection secured under this Act," we assume the converse is also true, and that a composer cannot gain dramatic protection under paragraph D of the Act for a musical composition which belongs under paragraph E, simply because such copyright owner arbitrarily and unjustifiably classifies a plain musical composition as a dramatico musical composition.

Rule 9 of the Copyright Office, Rules and Regulations provides as follows:

> "9. Dramatico musical compositions include principally operas, operettas and musical comedies or similar productions *which are to be acted as well as sung.*
>
> *Ordinary songs even when intended to be sung from the stage in a dramatic manner, or separately published songs from operas and operettas should be registered as musical compositions not dramatico musical compositions.*"

The vocal number "Sweethearts" is clearly not a dramatic work, nor is there any such claim by appellants. Their claim is based upon the fact that the song is a part of a dramatico musical work and is, therefore, entitled to the protection of paragraph D of Section 1 of the Act.

The appellants ignore the fact, however, that by their own act they have taken this vocal number out of the class of dramatico musical works because they have separately copyrighted, published, and sold it as a musical composition. Judge Hand in his opinion rendered on the dismissal of the bill of complaint succintly stated the situation as follows:

> "However, the authors took out a copyright upon the song separately as a musical composition, and in so doing they necessarily gave into the public domain all musical rights except as they were covered by the resulting copyright. Whatever may be the minimum of musical rights, it includes the right to perform the music publicly without any unnecessary accessories. Singing the words to the music, accompanied by the orchestra, is therefore within the musical rights so dedicated."

It is also important to note that a selection containing all the numbers of the comic opera "Sweethearts" was separately copyrighted, published and sold as a musical composition, and orchestrations thereof were also separately published and sold to all persons, including conductors of orchestras and leaders of bands.

Is it not fair to conclude from these facts that a license was thereby granted to the purchasers thereof to publicly perform such selections? Can

it reasonably be said that the leader of a band would buy an orchestration of a musical work for any purpose other than a public performance? Nor is the leader of an orchestra any more likely to purchase a full orchestration for strings, brass clarinets, drums, etc., for his private amusement.

The copyright owner has exclusive right to publicly perform the opera "Sweethearts" and to derive full financial benefit therefrom, but he has sought to obtain additional revenue by separately selling the vocal and instrumental numbers as musical compositions, and in so doing, under the provisions of the Act, he has ceased to have the exclusive right to publicly perform such numbers as musical compositions only.

No claim is made that the appellants have lost their exclusive dramatic performing right in the operetta or any portion thereof.

POINT IV.

The ruling of the Court below does not introduce a new requirement as to notice of copyright.

Counsel for the petitioner contends that the court below held "that the proprietor of a general copyright in an operatic work loses the dramatic performing right in any vocal number or selection therefrom separately published or copyrighted as a musical composition in case he fails to insert on such separate publication a notice stating that the entire operatic work was copyrighted." We do not understand that to be the ruling of the court below. The Circuit Court of Appeals states clearly the different rights which inure to the

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owner of a copyright of a dramatic or dramatico-musical compositions, and the owner of a copyright of a musical composition respectively. In the opinion it is stated,

> "The act gives the author of any dramatic or dramatico-musical composition who takes "out a copyright thereon, two distinct and "and separable rights. 1. It gives him the "sole right to print and sell copies of the "words and music; and 2. The sole right to "publicly perform it; and it gives the author "of a musical composition, in like manner, "two separable rights. 1. The right to print "and sell copies of the words and music. 2. "The right to perform the copyrighted work "publicly for profit."

It is therefore clear that a musical composition may be performed publicly under any circumstances if not for profit.

The court, assuming but not deciding, that a valid copyright had been acquired on that portion of the opera which was republished as a musical composition, concluded that, considered as a musical composition the owners of the copyright could not complain, because a public performance was given, which was not for profit. The song as sold in sheet music form, in the form attached to the record, indicates to the purchaser that it is merely a musical composition, and the notice of copyright affixed thereto only gives notice that the copyright is claimed on a musical composition. The court intimated that if the petitioners seek to reserve to themselves the additional rights prescribed by the statute for dramatico-musical works, that some additional notice should be affixed so as to notify a purchaser

that they are purchasing not a musical composition but a dramatico-musical composition. This observation by the court was merely in the nature of an illustration to show the injustice of the petitioner's claim, because it is stated in the opinion "whether if they had inserted a notice of the previous copyright they could have retained the advantages of it as to the republished song we need not now consider."

CONCLUSION.

We respectfully submit that the writ of certiorari prayed for be denied, and the petition dismissed.

Respectfully submitted,

GILBERT, LAUTERSTEIN & GILBERT,
Solicitors for Respondent.

Abraham S. Gilbert and
Francis Gilbert,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED de GRESAC MAUREL, and G. SCHIRMER, Inc.,

Petitioners,

vs.

THE SHANLEY COMPANY,

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION TO ADVANCE AND TO PLACE ON THE SUMMARY DOCKET.

PRESS OF FREMONT PAYNE, 47 Broad St.—'Phones, 1277-78-79 Broad.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, AND G. SCHIRMER,

Petitioners,

vs.

THE SHANLEY COMPANY.

No. 924.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION TO ADVANCE AND TO PLACE ON THE SUMMARY DOCKET.

Come now the petitioners in the above entitled cause, by their counsel, and move the court to advance the case for hearing at the next term and to place the same upon the summary docket.

The case involves the question whether the unlicensed performance in a cabaret of a selection from a dramatico-musical composition, copyrighted

by the petitioners, when no charge for admission to such performance is directly made, is a violation of the rights secured to the petitioners under the Copyright Laws of the United States. There is also involved the question whether the dramatic performing right in such selection is lost because of the omission on the separately copyrighted publication of such selection of notice of the copyright of the entire work, although there is inserted on such republication a copyright notice which is identical with the copyright notice on the entire work.

The case is typical in its facts of many others similar thereto. If the appropriation of the composition in this case constitutes a violation of the copyright, the appropriation for cabaret performance by the defendant or by others of other similar compositions of the petitioners, or of other composers, likewise constitutes a violation of the rights of the copyright proprietors. The case, therefore, is one of general public interest.

The question is one of statutory construction, and one which will not require extended argument. It is submitted, therefore, that it is a proper case to be advanced for early hearing on the summary docket.

Notice of this motion has been served an opposing counsel.

NATHAN BURKAN,
WM. J. HUGHES,
Counsel for Petitioners.

May, 1916.

JAN 3 1917
JAMES D. MAHER
CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 427 Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DEGRESAC MAUREL and G. SCHIRMER, INC.,
Petitioners,

against

THE SHANLEY COMPANY,
Respondent.

BRIEF FOR PETITIONERS.

NATHAN BURKAN,
Attorney for Petitioners.

WILLIAM J. HUGHES,
of Counsel.

PRESS OF FREMONT PAYNE, 47 Broad St.—'Phones, 3277-78-79 Broad.

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(a) The opera "Sweethearts" is a drama within the meaning of Section 1, subdivision (d) of the Copyright Act of 1909 19

(b) The protection of the exclusive dramatic performing rights in the opera extends to every material part thereof 20

(c) It is conceded that the unauthorized public performance of a copyrighted dramatic work is an infringement, whether it be given for profit or not 21

(d) Under Section 1, subdivision d, of the Copyright Act, the public performance of a dramatic work in any manner whatsoever is an infringement if such performance is unauthorized 21

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DEGRESAC MAUREL and G. SCHIRMER, INC., Petitioners, against THE SHANLEY COMPANY, Respondent.	No. 427 Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR PETITIONERS.

Statement.

This action was brought to enjoin the defendant from publicly performing in a restaurant conducted by the defendant the principal vocal number of the copyrighted opera, entitled "Sweethearts." The vocal number performed in defendant's restaurant bears the same title as the opera, "Sweethearts," and consists of words and music. A copy of it is annexed to page 30 of the Record, marked Exhibit C.

It is admitted that the opera "Sweethearts" was duly copyrighted by the complainants (page 42);

that the vocal number "Sweethearts" is a component and important part of the opera; that it is a link of the dramatic action, and that the success and popularity of the opera are largely due to this vocal number. (Allegations of complaint not denied, page 15).

It is also admitted that the defendant caused the vocal number "Sweethearts" to be performed in its restaurant by its employees (page 15).

The vocal number was performed on a platform on which an orchestra was seated, and on which singers appeared (page 11).

It is admitted that the vocal number was performed as part of an entertainment given by the defendant for the amusement of its patrons (page 15). No special admission fee was charged for these entertainments, but it is alleged by defendant's secretary that it expected to sell some food or drink to those who entered its restaurant at the times when the performances were given (page 17).

It is admitted the entertainments were an incident of the defendant's business (page 18), and that they were advertised in the newspapers as features of defendant's business by advertisements reading as follows:

"SHANLEY'S,
Broadway—43rd to 44th St.
Perfection in Food and Service,
Inimitable Entertainment.

Famous for Dinners and Suppers

CABARET EXTRAORDINAIRE
Twenty Acts Every Evening 7 to 1.

SUPERIOR SEVEN-COURSE
LUNCHEON, 75c. (MUSIC)."

(Paragraph XV of complaint, not denied, page 16).

The word "Cabaret" as used in defendant's advertisements has acquired a well understood meaning. It indicates a class of entertainments given in restaurants and hotel dining rooms and advertised as inducements for the public to patronize these places (page 18). The class of entertainments known under the name "cabaret" is shown by a number of newspaper advertisements published by New York restaurant proprietors (pages 21-27).

The complainants contend that the public performance of a vocal number of a dramatico-musical work in the manner and under the circumstances shown is an infringement of two of the exclusive rights included in the copyright, namely:

1. Of the dramatic performing right defined in subdivision (d) of section 1, of the Copyright Act of March 4, 1909 (35 Stat., 1075), which reads as follows:

> "(d) To perform or represent the copyrighted work publicly if it be a drama * * * and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever."

2. Of the musical performing right defined in subdivision (e) of Section 1, of the Act reading as follows:

> "(e) To perform the copyrighted work publicly for profit, if it be a musical composition."

The defendant contends that the complainants cannot avail themselves of the dramatic performing right secured by the copyrighting of the opera,

because they separately published and copyrighted the vocal number "Sweethearts" as a musical composition. As the vocal number, it is claimed, had thus been given the character of a musical composition, *a public performance thereof, if not for profit,* was not an infringement. It was further contended that the performance of the vocal number given by the defendant, in the manner shown by the record, was not a performance for *profit.*

The case was heard on bill, answer, affidavits and a stipulation as to certain facts. The District Court dismissed the bill (222 Fed. R., 344). On appeal the Circuit Court of Appeals held that the performance given by the defendant *could not be considered a performance for profit because no admission fee or direct pecuniary charge was exacted* (229 Fed. R., 340).

It was further held that the complainants had lost the dramatic performing right in the vocal number "Sweethearts" because the separate publication thereof did not contain in addition to the notice of the copyright in the vocal number, a notice showing that the entire opera was copyrighted.

Argument.

POINT I.

The performance of the vocal number "Sweethearts" in the defendant's public restaurant, given as a part of the operation of such restaurant business, and for the purpose of attracting patrons, was a public performance for profit.

The performance was given as a part of the operation of defendant's business.

Defendant is a corporation organized for the purpose of conducting a restaurant and place of public accommodation (page 14) and of "serving food and drink to patrons who pay the price therefor" (page 17).

While no *direct* charge is made for the privilege of witnessing the performances given, they are intended only for those who purchase food or drink and pay for it.

This sufficiently appears from the following statement of John J. Moran, defendant's secretary, viz.:

> "The only remuneration received by the defendant from any of the patrons who enter said restaurant is from the sale of food and drink that is ordered by the said patrons. There is no rule requiring the patrons to order or pay for a minimum of food or drink. A person who only desires a sandwich has as much right to enter said restaurant and receives as much attention from the management thereof as a person who desires to order an elaborate meal" (page 17).

In another part of his affidavit defendant's secretary states:

> "The music, however, was never the principal business of a restaurant keeper. It has always been and now is purely incidental to the restaurant business, and the price charged for food and service is the same without as with the music" (page 18).

It is quite evident that these performances constitute a part of the business of selling food and drink and that they are intended for and are ac-

cessible to none but patrons, that is, persons who order and pay for something, whether it be a sandwich or an elaborate meal.

The entertainment is not free for one who buys nothing.

In the affidavit of John Leffler, which was filed in support of the bill of complaint, it is stated that when he entered the defendant's establishment, a waiter came to him and asked him what he wanted to order (page 11).

The defendant publishes advertisements in which the patronage of its business by the public is requested. These advertisements speak for themselves. They bear evidence of the fact that the cabaret entertainments are held out as *inducements* to those who will buy meals and refreshments from the defendant.

In paragraph XV of the bill of complaint, which is not denied, it alleged:

"XV. That the defendant advertised the business conducted on said premises in the New York Review, the New York Times, and other papers published and circulated in the City of New York, in the manner following, to wit:

"SHANLEY'S
Broadway—43rd to 44th St.
Perfection in Food and Service
Inimitable Entertainment.

FAMOUS for Dinners and Suppers" (page 6).

CABARET EXTRAORDINARE

Twenty Acts Every Evening 7 to 1
SUPERIOR SEVEN-COURSE LUNCHEON, 75c. (MUSIC).

It can hardly be denied that the object of the defendant in giving its cabaret performances was to secure more purchasers for its articles of food and refreshment, and thereby more gain.

This was the view taken by Judge Lacombe when the case of John Church Company vs. Hilliard Hotel Company was heard in the U. S. District Court. His decision was as follows:

> "The circumstance that complainant could not prove any specific sum as 'profit' resulting from the playing of the copyrighted music seems to me immaterial. The place was 'public' although all the public could not gather in it and I think, as did the Judges in Sarpy vs. Holland, 99 L. T., 317, that *the hotel would not have paid for the playing of the piece unless in some way or other, they were to gain thereby.*"

In Sarpy vs. Holland, 99 Law Times, 317, the defendant Holland employed a band of musicians to play in his hotel. Cozens-Hardy, M. R., said:

> "This performance was paid for by Mr. Holland, the publican, with the view of gain; it was worth his while to pay I think 16 s. a performance. It was obviously part of the means by which he attracted customers and hoped to gain and did gain a profit in carrying on the business of the hotel. That being so, it seems to me impossible to contend that this was a performance at a gratuitous public entertainment. Obviously the people who

> went in large numbers every night went there not merely in the expectation, but with the certainty, that they would not go there, and indeed could not go there, without buying some of the commodities which Holland was there for the purpose of selling. The music was really part of the operations of the hotel."

The conclusion of the Master of the Rolls was not based on the circumstance that the musicians were paid, but on the fact that the performance was part of the means by which customers were attracted.

In Weistblatt vs. Bingham, 58 Misc., 328, a motion picture exhibition was given in an ice-cream saloon. Judge Crane of the New York Supreme Court, held:

> "While no entrance fee is charged for this exhibition, it is evident that it is conducted for the purpose of drawing trade and of gathering people into the place to purchase soda or ice cream while viewing the pictures. A person who came in and occupied one of the chairs at a table, without ordering something, I imagine would not stay very long. *In this indirect way a profit is made out of the moving picture show.*"

An entertainment given for the patrons of a restaurant, who are admitted on the understanding that they make some purchase, is not essentially different from an entertainment to which an admission fee is charged.

In one of the English cases each person desiring admission to an entertainment was required to buy

a refreshment ticket. (Wall vs. Taylor, Wall vs. Martin, 52 L. J. Q. B., [N. S., Part 2], 558, 559.)

The admission fee is sometimes disguised. Entertainments are given to which admission may be had on payment for a "hat-check," which entitles the holder to the cloak-room service.

If the proprietor of a dance hall furnishes the dancing floor and music without special charge, but exacts the purchase of a hat-check, is there any difference between the musical performance given by him and that given in a concert hall to which a general admission fee is charged?

The proprietor of the dance hall often sells refreshments to his patrons. He may derive more profit from the sale of refreshments than from the hat-checks and may come to the conclusion that he would attract more patrons and realize on the whole a larger profit by dropping the charge for the hat-check.

He would then admit the public without direct charge and yet he would reap an increased profit from those admitted who would all be expected to make some purchase.

Would it be a correct view of the musical performances given in such a dance hall to say that they are for profit while the payment for a hat-check is exacted, and not for profit when no such direct charge is made, but a purchase is "expected" —which means exacted—from the patrons?

In view of what has been said, it is not a reasonable construction of the words "for profit" to limit them to *direct* pecuniary charges exacted from the audience, as was done by the Circuit Court of Appeals in the case at bar and in John Church Co. vs. Hilliard Hotel Co., 221 F., 229.

In this connection see

Pierce vs. Milwaukee & St. Paul R. R. Co., 23 Wis., 387.

In its opinion in the Church Co. case, the Circuit Court of Appeals says:

> "If the complainant's construction of it (the Copyright Act) is right, then a church in which a copyrighted anthem is played is liable, together with the organist and every member of the choir, not only to injunction, but, in damages in the sum of $10 for each performance, and the individuals perhaps to fine and imprisonment in addition, because there is an expectation that the congregation will be increased by making the service more attractive" (221 Fed. R., at page 231).

No such deplorable result as is pictured by the Court would follow from the construction claimed by the complainants.

A church is not a business organization. It is not formed or conducted for purposes of profit. An increase of its membership will not increase its gain or profit. Hence, an entertainment given by a church for the purpose of increasing the congregation, would not be a performance for profit. Performances for religious purposes are clearly exempted by Section 28 of the Act.

A very different case is presented when a musical performance is given by a business corporation *as a part of the operation of its business and for the purpose of attracting patrons to the business, which means purchasers for its goods and service.*

POINT II.

The Copyright Law, in Section 28, expressly specifies in what instances musical works may be freely performed; hence, no construction of the law should prevail which would permit any unauthorized performances except those expressly enumerated.

In construing the language of the copyright statutes, regard should be had to the intention of Congress, and to the object of copyright legislation.

The question of the scope of musical copyright is dealt with in Section 28 of the Copyright Act of 1909.

The second half of Section 28 provides as follows:

> "Provided, however, that nothing in this Act shall be so construed as to prevent the performance of religious or secular works, such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit."

This provision indicates the intention of Congress to limit free performances of musical works to those given for charitable or educational purposes, and of the classes above enumerated.

The clause is incompatible with any construction of section 1, sub-division e, which would per-

mit the free production of musical works like the one here involved for purposes of business, that might result in personal gain, whether directly or indirectly.

The copyright act as passed in 1909, was framed by the Committee on Patents of the House of Representatives, collaborating with the Committee on Patents of the Senate. When the bill in its final form was submitted to Congress, the Committee on Patents of the House of Representatives submitted a report recommending the passage of the bill. The report is dated February 22nd, 1909, and is entitled "60th Congress, 2d Session, House of Representatives, Report No. 2222." On page 16 of said Report, it is said as to the latter half of Section 28:

> "The existing law provides that any person publicly performing a dramatic or musical composition without the consent of the proprietor of the copyright shall be liable for damages of not less than $100 for the first and $50 for every subsequent performance, and this prohibition covers cases of public performances where the performance is not for profit. We have provided in this section that where the public performance is given by public schools, etc., for educational or charitable purposes, and not for profit, it may be done without subjecting those who give the performance to any suit for damages; and we further provide that the music used for the performance may be rented, borrowed, or obtained from public libraries or other public schools," etc.

The intention to limit free performances to the instances specified in Section 28 is here clearly expressed. *Expressio unius est exclusio alterius.*

As Congress concurred in the report of the joint Committee and passed the bill in the form recommended in this report, the report may be cited as some evidence of the legislative intent.

The construction of section 1, sub-division e, contended for by the complainants, is the only construction that is in harmony with the purposes of copyright legislation as they have been long recognized.

The object of copyright legislation is to secure to the author all the benefits that may be derived from the use of his works.

Prior to 1897, composers of musical works not belonging to the class of dramatico-musical works and therefore not entitled to protection as dramatic works, were not entitled to the exclusive performing rights in such compositions.

This inequality of protection was removed by the Act of January 6, 1897, which amended Section 4966 of the Revised Statutes so as to make it equally applicable to both dramatic and musical compositions. In White Smith Co. vs. Apollo Co., 209 U. S., at page 16, this Court, speaking by Mr. Justice Day, said:

> "The purpose of the amendment evidently was to put musical compositions on the footing of dramatic compositions so as to prohibit their public performances."

The revision of the copyright laws which resulted in the passage of the present Act was taken up by Congress in response to a message of President Roosevelt, dated December, 1905, in which the defects of the then existing copyright laws were pointed out and the desirability of so revising the

law as to secure the complete protection of authors was urged.

Such being the object of the revision of the copyright laws in the form of the present Act, it is reasonable to assume that Congress had no intention to take away any substantial protection previously granted to composers.

The instances mentioned in Section 28 where the performance of musical works for certain charitable and educational purposes is permitted, do not place the composer to any material extent in a less favorable position than he enjoyed under the law of 1897, because it had long been the prevailing custom to permit free use of musical works for charitable and educational purposes.

The purpose of the Copyright Law would be to a large measure defeated if the permission of free performances were extended by construction beyond the instances specified in Section 28.

POINT III.

By the separate publication of the vocal number "Sweethearts" containing one copyright notice which correctly states the year when both the entire opera and the separate number were copyrighted and the name of the proprietor of both copyrights, all rights secured by the copyright in the entire opera, including the dramatic performing right, are preserved with respect to the vocal number.

The vocal score of the comic opera "Sweethearts" was copyrighted in the year 1913, as a

"dramatico-musical composition," one of the classes specified in Section 5 of the Copyright Act. The copyright was secured by publication with the following notice of copyright, viz.:

"Copyright, 1913, by G. Schirmer."

Subsequently, but during the same year, the vocal number "Sweethearts," was separately published with the following copyright notice:

"Copyright, 1913, by G. Schirmer."

In the Copyright Office the vocal number "Sweethearts," was registered as a musical composition.

The title of the separate publication of the vocal number is as follows:

"Sweethearts

Waltz-Song from the Comic Opera Sweethearts.

Book by Harry B. Smith & Fred de Gresac.

Lyrics by Robert B. Smith.

Music by Victor Herbert."

(Exhibit C, annexed to page 30.)

The Circuit Court of Appeals held that the petitioners had lost the dramatic performing right in the vocal number "Sweethearts" because they failed to insert on the separate publication thereof a notice stating that the entire operatic work was copyrighted.

This ruling introduces a new requirement as to notice, and a new penalty for the failure to con-

form to such requirement, which requirement and penalty are at variance with the language and intent of the Copyright Act.

When a composer copyrights his opera by publication, he is not required to state in his notice of copyright whether he classifies it as a dramatic work or as a musical composition. A general notice of copyright is sufficient.

Upon publication with a general copyright notice, the composer or owner of the work acquires all the rights enumerated in Section 1 of the Copyright Act (35 Stat., 1075) which are applicable to his work.

If a work is equally suitable for several of the uses and methods of reproduction mentioned in Section 1, the exclusive right to all of them is secured by publication.

And all these rights are secured before the work is classified. The owner is not required to classify his work until after the copyrighting has been effected. The specification of the class is to be made in the application for registration of the copyright (Section 5).

As all the rights mentioned in Section I have become vested in the copyright proprietor before he classifies his work, his manner of classifying it could only affect his rights by implying an abandonment from the selection he makes among the classes mentioned in Section 5.

But Congress expressly forbade any such implication by providing at the end of Section 5: *"nor shall any error in classification invalidate or impair the copyright protection secured under this Act."*

Under this saving clause of Section 5 a composer of an opera who copyrights his work by pub-

lication and then classifies it as a musical composition, does not lose the right to claim protection for it as a dramatic work.

The same reasoning applies to a part of an opera separately published with notice of copyright, when such part is classified as a musical composition.

Like the complete operatic work, a vocal number or selection taken from it may be classified as a dramatico-musical work, or as a musical work.

The fact that the composer or owner classifies it as a musical composition cannot, under the last clause of Section 5, be held to be an abandonment of any right of protection which existed in such number or selection prior to and independent of such classification.

The decision of the Circuit Court of Appeals furthermore restricts the scope of Section 6 of the Act in a manner which is in conflict with the language and intent of the law. Section 6 provides as follows:

> "That compilations or abridgments, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain, or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works published with new matter, shall be regarded as new works subject to copyright under the provisions of this Act; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works."

Under the above section an arrangement of a part of an opera shall be treated and may be copyrighted as a new work, and its publication shall not affect the scope of any copyright previously acquired in any matter included in such new work.

If such an arrangement is to be treated as a new work, only one copyright notice stating the year when such new copyright was secured and the name of the copyright proprietor is required.

The same view was taken by the Circuit Court of Appeals for the Second Circuit in West Publishing Co. vs. Edward Thompson Co., 176 Fed. Rep., 833, 837, where it was said:

> "Section 6 of the Act of 1909 (Act March 4, 1909), which is obviously declaratory, seems to confirm Justice Clifford's view (in Lawrence vs. Dana, 4 Cliff., 1) that there is but one copyright of the same book, that additions and improvements make a new book, and that the only notice required is of the date of entry of the last edition."

There would be no reason for the provision in Section 6 preserving the full force of any subsisting copyright in any matter used in another form in a new copyrighted publication, if it were intended that in such new publication notice of the prior copyright must be given.

If two copyright notices were necessary, one of the old and one of the new copyright, the copyright in the old matter as well as in the new matter, or in the new form, would be protected without Section 6.

If notices of two copyrights were required, the work would not be treated as one new work, but as an amalgamation of an old work and a new work.

In respect to the copyright notice, the intent of Congress to avoid the need of more than one notice in one publication is evident.

Section 19 provides that one notice of copyright in each volume or in each number of a newspaper or periodical shall be sufficient.

Section 46 permits the name of the assignee to be inserted in place of the original copyright proprietor, thus making unnecessary the naming of successive copyright owners.

There is also apparent a policy of guarding against the loss or abandonment of copyright by mere mistake or inadvertence. That policy is shown in the closing provision of Section 5 and also in Section 20, which provides that the omission of the prescribed notice by accident or mistake shall not invalidate the copyright.

POINT IV.

The public performance of the vocal number "Sweethearts" was an infringement of the exclusive dramatic performing right secured by Section 1, subdivision (d) of the Copyright Act. Whether performance of a dramatic work is for profit or in the manner of a dramatic entertainment, is immaterial.

A. *The opera "Sweethearts" is a drama within the meaning of Section* 1, *subdivision* (*d*) *of the Copyright Act of* 1909.

Operas have been classed with dramas since the Act of August 18, 1856, which granted exclusive performing rights in dramatic works.

Drone on Copyright, page 589.
The *Iolanthe* Case, 15 F. R., 439, 442.

The Copyright Act of 1909 classifies dramatico-musical works with dramas (Section 5, Subdivision d; Section 25, b, Subdivision Fourth).

B. *The protection of the exclusive dramatic performing rights in the opera extends to every material part thereof.*

It is admitted that the vocal number "Sweethearts" is a material part of the opera and is itself a dramatic composition.

The following facts alleged in paragraphs IX and XII of the bill of complaint are not denied, viz.:

> That the vocal number "Sweethearts" was written and composed as and *is a component part of the opera;* that it is a *link of the dramatic action* of the opera; that it was performed as a part of and in the performances of the opera; that it is *an important part of the opera,* being the *leading vocal number of the opera,* and that *the success and popularity of the opera is largely due to this vocal number* (page 4).

Under Section 3 of the Copyright Act the dramatic performing right in the entire opera protects all its copyrightable component parts.

Section 3 reads:

> "That the copyright provided by this Act *shall protect all the copyrightable component parts of the work copyrighted, and all matter*

therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this Act."

C. *It is conceded that the unauthorized public performance of a copyrighted dramatic work is an infringement, whether it be given for profit or not.*

D. Under Section 1, subdivision d, of the Copyright Act, the public performance of a dramatic work in any manner whatsoever is an infringement if such performance is unauthorized.

It is not necessary to show that the performance was itself part of a dramatic entertainment.

But the undisputed facts in the case at bar show that the performance of the vocal number "Sweethearts" was given as a part of a dramatic entertainment. The entertainment was advertised as consisting of twenty acts.

The rendition of a song is never described as an "act" unless it forms a part of a dramatic or theatrical performance.

The entertainment given by defendant consisted of the rendition of music and the singing of songs on a platform erected in defendant's restaurant. That platform answered the purposes of a stage.

> Mayor vs. Eden Musee Co., 102 N. Y., 593, 595.

The defendant designates the entertainment by the term "Cabaret Extraordinaire" (page 6).

The meaning of the term "cabaret" may be gained from the advertisements of the leading New York restaurants and hotels, which are found in the record as part of the affidavit of Victor Herbert (page 13).

According to these announcements, which represent the prevailing practice in this respect, the cabaret is an entertainment of a dramatic character.

In its most developed form the cabaret is a regular show divided into acts.

The defendant can hardly claim that its entertainment offered less than other cabarets when it is announced as an *extraordinary cabaret* consisting of twenty acts.

But the protection provided by dramatic copyright would be very insecure if it depended upon proof that an unauthorized performance was given with the usual appurtenances of a theatrical show.

In Russell vs. Smith, 12 Q. B., 217, 236, it was said:

> "We should take away a part of the protection conferred on authors if we held that there could be no public representation without these accompaniments."

It is true that the defendant's performance was not in costume and the stage had no proscenium, wings or back drop.

But in these respects the performance differed less from the usual dramatic performance than a motion picture exhibition which substitutes photographs for living actors and a screen for the stage.

It was the purpose of Congress to protect the author against subterfuge and indirect infringe-

ment when it expressly extended dramatic copyright to the right to perform the work *"in any manner or by any method whatsoever."*

POINT V.

The contention that the complainants by selling copies of the separately copyrighted vocal number impliedly gave a license to the purchasers to publicly perform it, is refuted by the express provisions of the Copyright Act.

Section 41 provides as follows:

> "Sec. 41. That the copyright is distinct from the property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object; but nothing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained."

The rights enjoyed by a musical author under the Copyright Law, Section 1, are to print, reprint, publish, copy and vend the copyrighted work; to arrange or adapt it; to perform the copyrighted work publicly, if it be a dramatic work, and publicly for profit, if it be a non-dramatic musical work, and to make any arrangement or setting of it or of the melody of it in any system

of notation. Under Section 41 the sale of a copyrighted musical work does not transfer to the purchaser any of the rights secured by the author under Section 1, Subdivisions a, b, d and e.

The question whether publication and sale of a musical composition deprives the author of the exclusive right of representing or performing it, came up for decision in the case of Chappell vs. Boosey, 21 Chancery Division (1882), pages 232-6. It was argued in that case that the very object of publishing a song as a book is that the public may buy and sing it, and the author cannot afterwards be heard to say that the person buying the song from him must not put it to the use for which it was bought.

Judge North in his decision said:

> The author had two different rights: one, that of copyright proper, preventing the multiplication of copies of the piece itself; the other being what may be called the acting right or performing right, conferring upon him the power of preventing other persons from publicly representing or performing the piece without his consent. * * *
>
> "Those rights are quite distinct, each being a separate property, and each capable of being assigned without the other. * * *
>
> "Now, it is contended for the defendant, that the fact of the publication for sale of a musical composition as a book prevents the subsequent acquisition or enjoyment of the acting or performing right. Why should it do so? It is said that no one would buy such a piece if the purchaser could not use the piece he paid for, and therefore that the sale of the

piece necessarily carries with it the right to make such use of it as the purchaser thinks fit. But this consequence does not follow; for it is only the performance of the piece in public, that under the section I have just read the existence of the acting or performing right prevents; and it is obvious that the greater number of sales of musical pieces take place to persons for private use and without having any public performance in contemplation.

"In the next place, I think, that if the publication of a musical composition as a book before the piece had been publicly performed prevented the subsequent acquisition of any acting or performing right, it must follow that the publication of the same composition as a book at any time after the piece had been publicly performed, would from that time forward put an end to any acting or performing right in the piece existing prior to such publication, for the reasons existing in the former case would be of equal weight in the latter. If so, the defendant's contention comes in short to this, that the enjoyment of, or the power of acquiring, the acting or performing right is determined by the publication of the book at any time; and the author must choose whether he will abstain from publishing the book, and thus be unable to reap the benefit of the copyright therein which the Act confers upon him, in which case he can enjoy the acting right; or whether he will publish the book, and lose thereby the acting or performing right. I cannot find anything in the Act, or in reason, to support this contention."

It is illogical to claim that purchasers of a copy of a part of an opera should acquire by such purchase rights which they would not acquire by purchasing copies of the entire opera.

The separate publication of a part places that part within easier reach of those who wish to perform it. A higher price must be paid by them for the whole than for the part.

In the case at bar the respective prices of the entire vocal score, of the selection and of the separate number are printed on the title page of Exhibit C (page 54).

The complainants would receive $2 for the entire vocal score, and it is admitted that by selling this score they do not impair their dramatic rights.

But by selling a selection at 75 cents or a number at 60 cents it is claimed that they abandon their dramatic rights. It would be both illogical and unjust to thus penalize the issuing of the cheaper publication.

The purchasers have notice in the case of the whole opera, as well as of a separate number, that they buy subject to the dramatic rights of the copyright proprietor. Such notice is conveyed to them by the copyright notice.

Proper copyright notices are inserted on all the separate publications. (See Exhibits C, D and E.)

In the District Court mention was made of the reservation of performing rights that was formerly required under the English Act of 1882.

But that requirement has been done away with, the Act of 1882 as well as the amending Act of 1888 having been repealed by the English Copyright Act of 1911. This change was made in accordance with the provisions of Article 11 of the Berlin Copyright Convention which is as follows:

"Article 11.

The stipulations of the present Convention apply to the public representation of dramatic or dramatico-musical works, and to the public performance of musical works, whether these works *be* published or not.

Authors of dramatic or dramatico-musical works are protected during the term of their copyright in the original work against the unauthorized public representation of a translation of their works.

"In order to enjoy the protection of this article, authors, in publishing their works are not obliged to prohibit the public representation or public performance of them."

(Report, Library of Congress, 1909, pages 111-112; Weller, Stage Copyright, pages 34, 186.)

The decrees below should be reversed and judgment should be directed as prayed for in the bill of complaint.

Respectfully submitted,

NATHAN BURKAN,
Attorney for Petitioners.

WILLIAM J. HUGHES,
of Counsel.

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JAMES D. MAHER
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IN THE

Supreme Court of the United States

October Term, 1916.

No. 427 Certiorari to the United States Circuit Court of Appeals, for the Second Circuit.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL and G. SCHIRMER, Inc.,
Petitioners,

against

THE SHANLEY COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

GILBERT, LAUTERSTEIN & GILBERT,
Solicitors for Respondent.

A. S. GILBERT,
FRANCIS GILBERT,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1916.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE-GRESAC MAUREL and G. SCHIRMER, INC., Petitioners, AGAINST THE SHANLEY COMPANY, Respondent.	No 427 Certiorari to the Circuit Court of Appeals for the Second Circuit.

BRIEF FOR RESPONDENT.

Statement.

This action was brought to enjoin the defendant, the owner of a restaurant in the City of New York, from performing in the restaurant a musical composition entitled "Sweethearts." The application for a final order was made to the District Judge on the bill of complaint, the answer, affidavits and the stipulation as to facts. The application for final order was denied (Opinion of Hand, D. J., fols. 56-60). An appeal was taken to the Circuit Court of Appeals for

the Second Circuit and the final order dismissing the bill of complaint was affirmed (Opinion of Rogers, Circuit Judge, fols. 72-78). The record is now before this Court on a writ of certiorari duly issued.

Pursuant to the order of this Court this case and the case of the *John Church Co. vs. Hilliard Hotel Company and Henri De Martini*, are to be argued together. The two cases require a construction of two separate provisions of the copyright law (Act of March 4th, 1909). The Church Co. case presents a case under Section 1, subdivision (e) of the Copyright Law, and the Victor Herbert case (the one under consideration) presents a case under Section 1, subdivision (d) of the Copyright Law. The decision in both cases must depend ultimately upon the judicial interpretation of the words "for profit" as used in Section 1, subdivisions (d) and (e) above referred to.

Facts.

The respondent conducts a high class restaurant in the City of New York. The business is conducted as any such place of business usually is conducted, for the purpose of serving food and drink to patrons who pay for the price therefor.

> "No charge is made for admission to said restaurant or for the privilege of listening to any performance of music therein and the only remuneration received by the defendant from any of the patrons who enter said restaurant is from the sale of food and drink that is ordered by the said patrons. There

> is no rule requiring the patrons to order or pay for a minimum amount of food or drink. A person who only desires a sandwich has as much right to enter said restaurant and receives as much attention from the management thereof as a person who desires to order an elaborate meal" (Affidavit of John J. Moran, fol. 32).

No theatrical performance is given in the premises. There is no stage or any appurtenances that are necessary parts of the stage. The singers appear in no costume other than the conventional evening dress costume (Affidavit of John J. Moran, fol. 32). The respondent serves meals to its patrons all during the day, but gives the patrons musical entertainment during certain limited hours; at the lunch period from noon to 2 P. M. the orchestra plays; at the evening dinner hour and at the after-theatre supper period, from 6 P. M. until about 1:30 A. M., the orchestra plays, and at intervals during that time singers appear who sing various selections of a diversified character.

> "Some of the songs are popular melodies, some are selections from the operas, and some are musical compositions of a little higher musical quality than the popular songs and yet not part of a musical composition as important as an opera" (Affidavit of John J. Moran, fol. 32).

The young lady employed by the respondent purchased a copy of the musical composition en-

titled "Sweethearts," copies of which musical composition were on sale to the general public in the music stores in the City of New York (Stipulation as to facts, fol. 52).

It is admitted that the song "Sweethearts," the performance of which it is here sought to enjoin, was originally a part of the musical comedy or dramatico-musical composition known as "Sweethearts," duly copyrighted (p. 42), and it is also admitted that the vocal number "Sweethearts" is a component and important part of the opera, that it is a link of the dramatic action, and that the success and popularity of that opera are originally due to this vocal number. It is also admitted that a selection containing all of the numbers from the opera "Sweethearts" arranged for the piano, including the song "Sweethearts" here in question, was separately copyrighted as a musical composition and sold by the publisher, G. Schirmer, Inc., one of the petitioners, to all persons desiring to purchase the same.

The said selection containing the song "Sweethearts" was orchestrated and arranged for performance by bands and orchestras and copies of such orchestrations were sold by G. Schirmer, Inc., to all persons desiring to purchase the same, including conductors and leaders of bands and orchestras. The song "Sweethearts" as purchased by the performer employed by the defendant was separately copyrighted and sold as a musical composition in the form attached to the record, marked Exhibit "C" (Insertion between pages 30 and 31). No additional charge was made for meals when the musical entertainment was given (fol. 29).

Synopsis of the Argument.

(A) The vocal number "Sweethearts," as rendered by the performer in the respondent's restaurant, is not a dramatico-musical work but is only a musical composition.

(B) A vocal number originally part of a dramatico-musical work, when separately copyrighted and published as a musical composition, lacking every element necessary to a dramatico-musical work, cannot be classified as a dramatico-musical composition.

(C) The words "for profit" as used in Section 1, subdivisions (d) and (e) of the Copyright Law, must be construed to mean "for pay" or other direct pecuniary compensation.

(D) The performance of a song in a restaurant to which no admission is charged and where the musical entertainment is incidental to the restaurant business, is therefore not a performance "for profit."

POINT I.

The vocal number "Sweethearts" is not a dramatico-musical composition.

It is to be noted at the outset that a clear distinction must be drawn between musical compositions and dramatico-musical works, because pursuant to the provisions of the Copyright Law the owners of the copyrights covering such works acquire different rights. As to a dramatico-musical composition, the owner of the copyright has the exclusive right "to perform or represent the copyrighted work publicly if it be a drama * * * and to exhibit, perform, represent, produce or reproduce it in any manner or by any other method whatsoever" (Copyright Law, Sec. 1, subd. d). As to a musical composition, the owner of the copyright acquires the exclusive right "to perform the copyrighted work *publicly for profit* if it be a musical composition and for the purpose of public performance for profit" (Copyright Law, Sec. 1, subd. e). The public performance of a dramatic work is therefore expressly prohibited by any one other than the owner of the copyright (whether or not the performance is for profit being immaterial). The public performance of a musical composition is not prohibited, however, unless such performance is *for profit.*

Counsel for the petitioners, anticipating the futility of his contention that the performance of the song in a restaurant to which no admission is charged is a performance for profit, ingeniously

asserts the contention that the song itself is a dramatico-musical work and that the public performance thereof, irrespective of whether or not such public performance is for profit, is a violation of the provisions of the Copyright Law.

Considered as a separate publication, the vocal number "Sweethearts" (Exhibit "C") falls far short of the necessary essentials to a dramatic or dramatico-musical work. A dramatic work has been defined as—

> "A composition in prose or poetry usually intended to be acted upon the stage, presenting a story by means of characters speaking and acting in situations contrived to develop a plot, and with such accessories of stage machinery, costumes, etc., as are fit to produce an impression of reality" (Funk & Wagnall Standard Dictionary).

The musical number "Sweethearts" contains no story, no plot, is not intended to be acted, presents no situation, and in fact contains nothing but a simple love theme which requires none of the accessories of the theatre for proper presentation. In fact, in this case, the performer singing the song presented the same dressed in ordinary evening dress costume and without any attempt at theatrical presentation (fol. 32).

The essentials necessary to constitute a song a dramatic piece have been clearly set forth by A. L. Smith, L. J., in *Fuller vs. Blackpool Winter Garden*, 2 Q. B. (1895), 429, at p. 442, as follows:

> "I think that to constitute a song a dramatic piece it must be such a song that for its proper presentation acting and possibly scenery form a necessary ingredient, and that if neither of these can be a requisite to the efficient representation of the song it is not a dramatic piece. It is an entire misnomer to call a mere common, ordinary musical hall song, which required neither acting nor scenery for its production, a dramatic piece, for it is in truth nothing of the kind."

An examination of the song "Sweethearts" fails to disclose any of these requirements essential to a dramatic piece, and the conclusion is irresistible that this song is not a dramatic or dramatico-musical work but is merely a musical composition, the public performance of which if not for profit is not an infringement of the copyright.

POINT II.

The dramatic performing copyright covering the comic opera "Sweethearts" is not infringed by the performance of a musical number originally a part of the dramatic work but subsequently separately copyrighted and sold as a musical composition.

It having been admitted that the song "Sweethearts" was originally a part of the copyrighted dramatico-musical work also known as "Sweethearts," counsel for the petitioners contends that

the performance of the song was an infringement of the dramatico-musical copyright. In presenting this argument, counsel for the petitioners ignores the fact that the song was separately copyrighted and published as a separate musical number. The Copyright Law distinguishes clearly between dramatico-musical compositions and musical compositions. In Section 5 of the Copyright Law it is stated:

> "That the application for registration shall specify to which of the following classes the work in which copyright is claimed belongs * * *
>
> "(d) Dramatic or dramatico-musical compositions.
>
> "(e) Musical compositions * * *."

The copyright office rules and regulations further define these classes as follows:

> "(8-d) Dramatic and dramatico-musical compositions such as dramas, comedies, operas, operettas and similar works * * *.
>
> "(9) Dramatico-musical compositions include principally operas, operettas, musical comedies or similar productions, which are to be acted as well as sung. ORDINARY SONGS, EVEN WHEN INTENDED TO BE SUNG FROM THE STAGE IN A DRAMATIC MANNER, OR SEPARATELY PUBLISHED SONGS FROM OPERAS

AND OPERETTAS, SHOULD BE REGISTERED AS MUSICAL COMPOSITIONS, NOT DRAMATICO-MUSICAL COMPOSITIONS.

"(10-e) Musical compositions including either vocal, act or instrumental compositions, with or without words."

(Bowker on Copyright, its History and Law, pp. 162, 163.)

It is conceded that had the petitioners permitted the dramtico-musical composition "Sweethearts" to remain intact, the public performance of any portion thereof would have been an infringement of the copyright. No public performance could ever have been given of any portion of said dramatico-musical work, whether for profit or not. The petitioners, however, sought to increase their revenue by separately copyrighting and selling the musical numbers taken from the opera. By so doing, however, they lost the exclusive performing right therein. It is not claimed that they lost the exclusive dramatic performing rights in those separately published musical numbers which retain their dramatic quality, but merely the exclusive right to publicly perform any such separately copyrighted and published musical numbers having no dramatic quality when considered apart from the opera.

Justice Hand, in his opinion rendered on the dismissal of the bill of complaint succinctly stated the situation as follows (fols. 58-59):

"However, the authors took out a copyright upon the song separately as a musical composition, and in so doing they necessarily gave into the public domain all musical rights except as they were covered by the resulting copyright. Whatever be the minimum of musical rights, it includes the right to perform the music publicly without any unnecessary accessories. Singing the words to the music, accompanied by the orchestra, is therefore within the musical rights so dedicated. On the other hand we now have it on the authority of Church Co. v. Hilliard, supra, that a public performance of this kind is not within the statutory copyright which the plaintiffs received as consideration for their dedication. It seems necessarily to follow that the performance did not infringe.

This result no doubt involves the abandonment of some rights, secured by the dramatico-musical copyright, but that is because the plaintiffs wished a double protection. There can be no justice in preserving their dramatic rights at the expense of the public's rights arising from taking out a musical copyright. Had they wished to retain a complete dramatic monopoly, they had it in their power to do so. As it is, that monopoly remains to their complete protection except so far as its limitation is necessary to give full scope to the musical copyright. For instance, if the performance here had been anything beyond the least essentials to a musical reproduction of the copyrighted song, it would be protected, but it was not. The plaintiffs are

> really trying to eat their cake and have it; they would get the full benefit of a musical copyright, while they prevent the public from enjoying the corresponding rights."

It is also important to note that a selection containing all of the numbers of the comic opera "Sweethearts" was separately copyrighted, published and sold as a musical composition and that orchestrations thereof were also separately published and sold to all persons including conductors of orchestras and leaders of bands.

Is it not fair to conclude from these facts that a license was thereby granted to the purchasers thereof to publicly perform such selections? Can it reasonably be said that the leader of a band would buy an orchestration of a musical work for any purpose other than for a public performance thereof? Nor is the leader of an orchestra any more likely to purchase a full orchestration for strings, brass, clarinets, tubas, drums, etc., for his private amusement.

POINT III.

The performance complained of was not a performance for profit within the purview of the Copyright Law.

Assuming, as we must, that the song "Sweethearts" is not a dramatico-musical work but only a musical composition, it follows that a public performance thereof is not in violation of the provisions of the Copyright Law unless such pub-

lic performance was "for profit." Counsel for the petitioners contends that the performance having been given in connection with the restaurant business and the restaurant business being conducted for profit, that the performance of the song was therefore also for profit. The language of the Copyright Law does not permit of any such narrow interpretation; in fact the entire purpose of the Act as disclosed by its provisions indicates to the contrary.

The words as used have the significance "for compensation" or "for pay"; that is to say, no public performance may be given of a musical compostion to which an admission fee is charged. But the performance of the musical composition in a restaurant to which no admission is charged is not within this prohibition.

We contend that it is not the purpose for which a free performance is given, but the fact whether or not it is free, which determines whether the performance is "for profit" within the purview of the Act.

The petitioner argues that if our contention is sustained it will be possible for us to evade the statute by making an additional charge for meals where music is played, or in some other indirect way to charge for the musical performance. If this should be done in any of the ways suggested by counsel for the publishers, it could easily be proved. If we should charge an admission fee to the room where music is played, by a ticket which would entitle the holder to a cup of tea or other light refreshment, the music might well be considered the main thing and the refreshment a mere incident to the performance. If we should

charge more for meals in places where or at times when music is played, this would as easily be proved, and the Court doubtless would hold that we charged for music, and the amount of our charge for the music would be as readily determined as it would in the case of a straight admission fee.

In view of the fact that in the case at bar we made no such extra charge, we can justly say that neither directly nor indirectly have we charged for the music nor derived any profit or income from it. While our purpose in playing was to amuse our guests and attract others, whether the music did in fact accomplish this purpose, it purely conjectural; the song "Swethearts" may have driven more patrons from our dining-room than it attracted thereto.

It is true that the charge to the guest must cover the cost of his food and everything necessarily and reasonably incidental to its preparation and service, but music is not a necessary incident to the service of food, and the guest who pays for a meal cannot insist on music while he eats. Every hotel is under legal obligation to furnish food and necessary personal service to its guests, but no hotel is under any express or implied obligation to furnish music. The time and place of performance, and whether any performance at all is given, rest in the discretion of the hotel. Music is furnished only at certain times and meals are furnished at all hours, with no difference in the charge therefor when music is furnished.

The words "for profit" are expressly defined in Section 1 of the Act, with reference to coin-operated machines, as follows:

> "The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit *unless a fee is charged for admission to the place where such reproduction or rendition occurs.*"

It seems reasonable to assume that where the same expression is used twice in the same section of the Act, the legislative intent is the same in each case unless the contrary clearly appears.

The *Sarpy* case, referred to on page 7 et seq. of petitioner's brief, is readily distinguishable from the case at bar. That case was decided under Section 1 of the English Copyright Act of 1883, which is as follows:

> "On and after the passing of this act the proprietor of a copyright in any musical composition first published after the passing of this act, or his assignee, who shall be entitled to and be desirous of retaining in his own hands exclusively the right of public representation or performance of the same, shall print or cause to be printed upon the title page of every published copy of such musical composition a notice to the effect that the right of public representation or performance is reserved."

Reference to the case reveals the fact that there, as here, judicial opinions differ as to what constitutes a gratuitous public entertainment.

In the first place the English statute under which the *Sarpy* case was decided confers much greater rights upon the composer than the American. In England the owner of a copyrighted musical composition may, by printing notice thereof on each published copy, reserve to himself all rights of public performance or representation. The all-important words "for profit" do not appear in the English Act, nor is any equivalent expression used. Hence, any public performance, regardless of whether it is for profit or not, is an infringement. In the United States, however, it is not enough that the performance is public; it must also be for profit.

Secondly, the defendants in the *Sarpy* case claimed to be acting under the permission contained in the notice of reservation which allowed the performance of the music at "gratuitous public entertainments" and "entertainments which are absolutely free." The Court held the defendants to a strict compliance with the terms of this license. But the language of the license differs materially from that of the American Copyright Act. An artist may perform a work "publicly for profit" at a gratuitous public entertainment; and likewise, he may perform gratuitously at a "public" entertainment "for profit." In the first case the performance would constitute, under our law, an infringement by the artist, while under the conditions in the *Sarpy* case it would not; and the givers of the entertainment would be protected both under the *Sarpy* case and under our law. In

the second instance they would be guilty of an infringement both under our law and under the *Sarpy* case.

We submit also that the *Sarpy* case should not be followed because the opinion presents no convincing reasoning in support thereof. The Judges assign as the grounds of their decision that the performance was not a "gratuitous public entertainment": (1) The fact that the performance was paid for by the proprietor of the hotel "with a view of gain"; (2) It was part of the means by which he attracted customers; (3) The public could not go there "without buying some of the commodities which Holland was there to sell; (4) The "music was really part of the operations of the hotel"; (5) "The license cannot justify what was done."

The last reason is inapplicable to the case at bar because the language of the license differs from that of our Copyright Act materially.

The first reason seems altogether inadequate. Does the fact that the proprietor of a hotel paid for the performance of the music, assuming, as the Court does, that he did it "with a view of gain," make any difference in the character of the performance insofar as its being gratuitous is concerned? If the public without restriction had been admitted to the saloon free of charge and without the necessity of buying anything there, could it be said that the performance was nevertheless not a "gratuitous public entertainment" merely because the proprietor of the hotel had to pay for it?

As to the second ground, it is pure speculation, to say the least, to contend that a customer buys a meal because music is performed in the dining-

room. It is much more reasonable to assume that he does so because he is hungry.

The third ground may perhaps be a suitable test for "a gratuitous public entertainment," but it is not a proper test of whether the defendants are performing complainant's music "publicly for profit." The words in our Act can only contemplate a profit derived from the performance of the copyrighted music, not a profit derived from the sale of meals in the dining-room where music is played. When one cannot enter a place were music is being performed without buying something, the entertainment cannot be said to be "gratuitous" or "absolutely free"; and yet the *music* as such is not being performed "for profit" if no admission is charged. There is no profit derived from the performance of the music; the profit, if any, is derived from the sale of the meal.

By reason, therefore, of the difference in the statutes of this country and of England, as well as the circumstances under which the *Sarpy* case was decided, and the insufficiency of the reasoning of the Court in that case, it is respectfully submitted that the decision therein should not be controling here.

Immediately following his reference to the *Sarpy* case, counsel for the petitioner (page 8 of his brief) cites *Weisblatt vs. Bingham* (58 Misc., N. Y., 328) to the effect that a rule similar to to that in the *Sarpy* case was adopted by the New York Supreme Court.

This is misleading. The rule in the *Weisblatt* case is not the law of the State of New York.

The question in the *Weisblatt* case was whether the exhibition referred to was a common show

and therefore required a license, no such license being required for gratuitous entertainments.

The *Weisblatt* case was decided in 1908. In January, 1912, the Court of Special Sessions of New York County reached exactly the opposite conclusion in the case of *People v. Martin* (137 N. Y. Supp., 377), where it was held that a cabaret show in a restaurant was not a public performance for profit and hence required no license.

Again, in the case of *People v. Wacke*, 77 Misc., 196, the Court on a state of facts exactly like the *Weisblatt* case, refused to follow that decision, saying at page 200:

> "The defendant was not engaged in the moving picture business. He was conducting a hotel and was engaged in the hotel and liquor business. He was exhibiting the pictures for the entertainment of his guests as an incident to his hotel business at the seashore."

Both the *Martin* and the *Wacke* case follow *People v. Royal*, 23 App. Div., 258, which held that a person who hired a room where he illustrated the tricks and devices of gamblers, for the purpose of selling a book, to which exhibition no admission fee was charged, is not engaged in conducting an exhibition. The Court said *the sale of the book,* not the exhibition, was the *principal thing.* So, the sale of meals and not the performance of music, is the source of profit, if any, to the hotel.

POINT IV.

The enumeration in Section 28 of the Copyright Act of certain special cases where music may be publicly performed without the consent of the owner is not exclusive.

Counsel for the petitioners contends that Section 28 of the Copyright Act "indicates the intention of Congress to limit free performances of musical works to those given for charitable or educational purposes and of the classes there enumerated." The portion of Section 28 applicable to this discussion is as follows:

> "Provided, however, that nothing in this Act shall be so construed as to prevent the performance of religious or secular works such as oratorios, cantatas, masses or octavos by public schools, church choirs or vocal societies, rented, borrowed or obtained from some public library, public school, church choir, school choir or vocal society provided the performances are given for charitable or educational purposes and not for profit."

Counsel for the petitioners claims that no public performance of a musical work may be given without the consent of the proprietor of the copyright unless it is one of those enumerated in Section 28 above set forth. To so hold would render the provisions of Section 1, sub-division E

meaningless because under that Section a public performance of any musical composition can be given by any one if not for profit.

The Circuit Court of Appeals held in the Hilliard case (221 Federal Reporter, page 229):

> "This proviso must contemplate the charge of an admission fee because if the performance is really not for profit it would be perfectly lawful both under Section 1, subdivision E and under the prior provision of Section 28 itself. We must attribute a more plausible contention to Congress. We think it was to permit certain high class religious and educational compositions to be performed at public concerts *where an admission fee is charged*, provided the proceeds are applied to a charitable or educational purpose."

POINT V.

Congress did not intend the far-reaching consequences of a decision sustaining appellant's contention.

If counsel for petitioner is sustained in his contention that every performance of music is for profit, which is given in the hope of attracting trade or business then not only hotels and restaurants but many other forms of human activity will be affected.

If every free performance of music for the purpose of advertising, or attracting business, is "for profit" within the purview of the Act, and no

copyrighted music may be played for such purpose in any place to which the public has access, without obtaining a special license from the owner, a music store may not play copyrighted music for the purpose of selling an instrument or even the music itself. The public is invited to enter the store quite as much as it is to enter a hotel or a theatre.

A lone bugler walking down Pennsylvania Avenue playing any copyrighted musical composition with an advertising placard on his back would infringe the right of public performance for profit as would his employer who thus advertised his business.

Copyrighted music furnished by a political parade organized to attract voters for a candidate for a political office of honor and profit, would infringe. A free concert given by a municipality in a public park would also be an infringement because the musicians receiving pay would be giving a performance for profit. Surely Congress never intended this.

It would seem, therefore, that Congress intended the words "for profit" in Subdivision E to mean a public performance for pay, where the profit, if any, is derived from the music itself and not from some other business to which the music is a mere incident.

It is, of course, no argument against petitioner's contention that it is novel. But there is some significance in the fact that although Subdivision E was enacted in 1897, this is the first case in the United States in which such a claim has been advanced. In the intervening seventeen years there have undoubtedly been countless perform-

ances of copyrighted music, both appellant's and others, under circumstances similar to the case at bar. Apparently there has been a general acquiescence among both the composers and publishers of music in the interpretation of the statute advanced by us. It is respectfully submitted that no valid reason has been urged for unsettling this condition of affairs and applying the Act to situations not intended to be covered by it.

POINT VI.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

GILBERT, LAUTERSTEIN & GILBERT,
Solicitors for Respondent.

A. S. GILBERT,
FRANCIS GILBERT,
Of Counsel.

No. 427

JAN 10 1917
JAMES D. MAHER
CLERK

Supreme Court of the United States

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DeGRESAC MAUREL and G. SCHIRMER, INC.,

Petitioners,

against

THE SHANLEY COMPANY,

Respondent.

APPENDIX TO PETITIONERS' BRIEF.

History of Section 1, Subdivision (e) of Copyright Law.

NATHAN BURKAN,
Attorney for Petitioners.
WILLIAM J. HUGHES,
Of Counsel.

PRESS OF FREMONT PAYNE, 47 Broad St.—'Phones, 2277-78-79 Broad.

Supreme Court of the United States

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DEGRESAC MAUREL and G. SCHIRMER, Inc.,

Petitioners,

against

THE SHANLEY COMPANY,

Respondent.

HISTORY OF THE PROVISION FOR MUSICAL PERFORMING RIGHT IN SECTION 1, SUBDIVISION (e) OF THE COPYRIGHT LAW.

The revision of the Copyright Laws which took the form of the Copyright Statute of 1909 was the result of recommendation made by the President to Congress in December, 1905.

The passage in the President's message referring to copyright revision is as follows:

> "Our copyright laws urgently need revision. They are imperfect in definition, confused and inconsistent in expression; they omit provision for many articles which, under modern reproductive processes, are entitled to protection;

they impose hardships upon the copyright proprietor which are not essential to the fair protection of the public; they are difficult for the courts to interpret and impossible for the copyright office to administer with satisfaction to the public. Attempts to improve them by amendment have been frequent, no less than twelve acts for the purpose having been passed since the Revised Statutes. To perfect them by further amendment seems impracticable. A complete revision of them is essential. Such a revision, to meet modern conditions, has been found necessary in Germany, Austria, Sweden, and other foreign countries, and bills embodying it are pending in England and the Australian colonies. It has been urged here, and proposals for a commission to undertake it have, from time to time, been pressed upon the Congress.

The inconveniences of the present conditions being so great an attempt to frame appropriate legislation has been made by the Copyright Office, which has called conferences of the various interests especially and practically concerned with the operation of the copyright laws. It has secured from them suggestions as to the changes necessary; it has added from its own experience and investigation, and it has drafted a bill which embodies such of these changes and additions, as, after full discussion and expert criticism, appeared to be sound and safe. In form this bill would replace the existing insufficient and inconsistent laws by one general copyright statute. It will be presented to the Congress at the coming session. It deserves prompt consideration."

In the beginning of 1906 a bill to amend and consolidate the Acts respecting copyright was introduced in the House of Representatives under the designation "H. R. 19853." The same bill was introduced in the Senate as "S. 6330."

This bill contained the following provision with respect to musical works:

> "Section 1 (f). To publicly perform a copyrighted musical work, or any part thereof, or for purpose of public performance or the purposes set forth in subsection (b) hereof to make any arrangement or setting of such work, or of the melody thereof, in any system of notation."
>
> (Copyright Hearings, June 6-9, 1906, page V.)

The bill was discussed at a number of hearings before the Committees on Patents of the Senate and the House of Representatives sitting jointly.

At one of these hearings Mr. Albert H. Walker of New York criticised subdivision (f) of section 1 and made the following statement:

> "This is the situation of the law at the present time: If one of you gentlemen goes to church and joins in the singing of a hymn that is the subject of a copyright, you are liable to a penalty of $100 for the first time you join in that singing, and a penalty of $50 for every subsequent time, unless you yourself bought that particular hymn book at first hand from the publisher. That is the law now."
>
> (Copyright Hearings, June 6-9, 1906, page 173.)

At the same hearing Mr. Charles S. Burton made the following statement:

> "It is not believable that Congress intended to provide by this amendment that every member of a religious congregation joining publicly in the singing of a copyrighted tune should be liable to the penalties prescribed by this section; nor even that every member of a church choir, having purchased the copies of the copyrighted anthem, sold only for such purpose and useful only for such use, should be subject to these penalties, if the publisher omitted to grant expressly the permission to sing with the sale of a printed copy."
>
> (Copyright Hearings, June, 1906, page 201.)

In December, 1906, further hearings were held and at one of said hearings Mr. Arthur Steuart, Chairman of the Copyright Committee of the American Bar Association, appeared and recommended an amendment of subdivision (f). He made a statement and answered certain questions regarding his proposed amendment as follows:

> "Mr. Steuart. * * * Clause f ends with the words 'in any system of notation.' It was designed by those words to cover somewhat the same ground as is covered by clause g—in fact, to cover the whole ground that was covered by clause g. Clause g came in as the result of an earnest desire on the part of some people who wanted to make it very clear that this bill was intended to stop the use of music by mechanical

music-producing apparatus. Our criticism of clause g is that it attempts to encroach upon the patent law unnecessarily. We suggest that clause f be amended in this way:

'To publicly perform for profit a copyrighted musical work, or any part thereof, or for the purpose of public performance for profit, or the purposes set forth in subsection b (which is to sell, or so on) hereof to make any arrangement or setting of such work or of the melody thereof, in any system of notation or form of record in which the thought of an author may be recorded, and from which it may be read or reproduced.'

That will give to the composer and the music publishers everything which they could possibly get under the Constitution. That would be the copyrighting of a writing, and it would hold their compositions for every purpose for which they could be used which would result in their being produced as music to the ear or read by the eyes.

So far as the introduction of the word 'profit' is concerned, in the first line of that section, there has been a very great protest on the part of many people against the drastic nature of this bill, proposing to punish the public performance of copyrighted music. Now, that is the present law. The present law is just as drastic as the present bill in the prohibition of the use of copyrighted music. I have conferred with many of the music publishers, and I find that none of them have any objection to the introduction of the words 'for profit.' There is no reason in the world why a child

or a regimental band passing down the street singing or performing a copyrighted piece of music should be penalized for the act when it is a mere matter of entertainment and a mere matter of the use of music which has been bought or learned. The thing to be protected is the business of the music publishers and not to cut off the public from the enjoyment of music which can be received or enjoyed by any mode in which it is publicly performed. So that the introduction of the words 'for profit' in that clause will, I think, relieve the clause of all of the objections which have been made against it by those who think it is too drastic a restraint upon the free use and the free enjoyment of music."

Mr. Johnson. "How would it read then—that first line?"

Mr. Steuart. "To publicly perform for profit a copyrighted musical writing, or any part thereof, or for the purpose of public performance"—

Mr. Johnson. "For profit?"

Mr. Steuart. "Yes."

Mr. Chaney. "The words 'for profit' should be put in there, too?"

Mr. Steuart. "Yes; they might as well be put in at both places."

Mr. Johnson. "Because a band going down the street and playing a piece of music is giving a public performance."

Mr. Steuart. "Oh, yes; undoubtedly."

A Gentleman. "And the band gets paid."

Mr. Johnson. "Its performance is a public performance for profit."

Mr. McGavin. "If a man plays a piano for profit, would not this restrict him?"

Mr. Steuart. "It would restrict him if he played it for profit."

(Copyright Hearings, December 7-10, 1906, pages 161-162.)

At the hearings in December, 1906, Fromme Brothers, attorneys of New York City, submitted an argument in which the following statement occurred:

"It is also well known that all the public schools of the United States on the last day of the school year give a little musical entertainment of, say, half an hour duration, and in order to give that they either purchase copies from music dealers, borrow them from other schools, or rent them from music libraries, and they generally procure an orchestral arrangement to be used at this entertainment. Result, all the school children, the music teachers in the school, and the orchestra taking part would be subject to fine and imprisonment at the pleasure of the publishers. This also applies to all public singers, vaudeville performers, serio-comic singers, and orchestra in all the theaters in the United States."

(Copyright Hearings, December 7-10, 1906, page 171.)

At another session of the joint hearings, Mr. Tams, a music publisher, made the following statement:

"For years, gentlemen, the church choirs throughout the world have made it a practice on Christmas, Easter Sunday, and other festival days to give special musical services. And in order to give solemnity to these occasions they invariably use the local orchestra with the choir and the organ. In order to use them, they have to come to me for an orchestration, which means separate music sheets. The orchestra cannot play from the copies bought from the music stores. They have got to have specially prepared sheets, one for the clarinet, one for the cornet, and for the different instruments. After the performance those sheets have no commercial value. But under clause f, if this is enacted, and the choir gives its special services on Christmas or Easter, this music publisher can put in jail a whole choir, or the organist or the orchestra, and even the congregation, if they sing with them."

(Copyright Hearings, December 7-10, 1906, page 375.)

Thereupon the following colloquy took place between Mr. Tams and Mr. Currier, the Chairman of the Committee on Patents of the House of Representatives:

Mr. Currier. "As the bill now stands with the suggested amendments it would not have that effect; it would not affect schools and church choirs; it would affect no society that was not giving a public performance for profit."

Mr. Tams. "Even if that little society made one dollar profit it would be affected. I maintain that the custom that has prevailed up to the present time should continue."

Mr. Currier. "But the public schools and church choirs would not be affected if the amendments are adopted."

(Copyright Hearings, December 7-11, 1906, page 375.)

At the same hearings the Committee on Copyright and Trade-Mark of the Association of the Bar of the City of New York submitted a memorandum which contained the following:

"Section 1.—Subdivision (f).

"The public performance of a copyrighted musical work without permission of the copyright proprietor and *for profit* seems to this committee an obvious invasion of the rights of the composer. The words 'for profit' should be inserted in this subdivision, and its insertion will answer all the objections made to this section. There might be some question as to whether a performance of a musical work to a large number of invited guests was or was not a public performance. Or the rendering of some musical work in a public hall to charity; children, for example, and the real purpose of the law will be accomplished by inserting the words 'for profit.'"

(Copyright Hearings, December 7-11, 1906, page 403.)

In January, 1907, a revised bill was reported by the Committee on Patents of both Houses of Con-

gress. The revised House Bill was designated "H. R. 25133" and was accompanied by a report known as "Report No. 7083."

From this Report it appears that subdivision (e) of Section 1 of the revised bill was a consolidation of subdivisions (f) and (g) of the original bill and read as follows (page 9):

> "To perform the copyrighted work publicly for profit if it be a musical composition on which such right of public performance for profit has been reserved, as provided in section 14 of this act; and for the purpose of public performance for profit, and for the purposes set forth in subsection a hereof, to make any rearrangement or resetting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced."

The provision of Section 14 here referred to required the insertion of a notice on every published copy of a musical composition reserving the right of public performance.

This requirement and the reference thereto in Section 1, subdivision (e), were omitted from the final draft of the bill which was reported in the House of Representatives as "H. R. 28192" in February, 1909, and which was enacted without change.

Respectfully submitted,

NATHAN BURKAN,
Solicitor for Petitioners.

WILLIAM J. HUGHES,
of Counsel.

NOV 2
JAMES D.

No. 427

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED de GRESAC MAUREL, and G. SCHIRMER, Inc.,

Petitioners,

vs.

THE SHANLEY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION TO ASSIGN FOR HEARING.

Press of Fremont Payne, 47 Broad St.—Phones, 2277-78-79 Broad.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

VICTOR HERBERT, HARRY B. SMITH, ROBERT B. SMITH, FRED DE GRESAC MAUREL, and G. SCHIRMER, INC., Petitioners, vs. THE SHANLEY COMPANY.	No. 427.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION TO ASSIGN FOR HEARING.

This case and the case of John Church Co. vs. Hillard Hotel Co., No. 433, were brought to determine the question whether a performance of copyrighted music in a restaurant or hotel dining

room to which no admission fee is charged, and which performance is incidental to the business of the sale and service of food, is a performance for profit within the scope of the copyright law.

As the Church case has been advanced by the Court and assigned for hearing on January 8th next, it is respectfully submitted that it will conserve the time of the Court, and permit the presentation of different phases of the questions involved and the dispostion of both cases, if they can be heard together. Counsel for petitioners therefore move the Court to set the Herbert case down for hearing on January 8th next, with the Church case, in the time of one case.

Notice of this motion has been given to opposing counsel and to counsel on both sides in the Church case.

November 20, 1916.

NATHAN BURKAN,
WM. J. HUGHES,
Counsel for Petitoners.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1916

No. [redacted] 433

THE JOHN CHURCH COMPANY, PETITIONER,

vs.

HILLIARD HOTEL COMPANY AND HENRI DE MARTINI.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 1, 1916.

CERTIORARI AND RETURN FILED APRIL 21, 1916.

(25,213)

(25,213)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 930.

THE JOHN CHURCH COMPANY, PETITIONER,

vs.

HILLIARD HOTEL COMPANY AND HENRI DE MARTINI.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 2, 1916.

a United States Circuit Court of Appeals for the Second Circuit.

In Equity.

THE JOHN CHURCH CO., Complainant-Appellant,
against
HILLARD HOTEL COMPANY and HENRI DE MARTINI, Defendants-Appellees.

TRANSCRIPT OF RECORD.

On Appeal from District Court of the United States for the Southern District of New York.

1 *Subpœna, Filed June* 17, 1914.

The President of the United States to The Hilliard Hotel Company and Henri de Martini:

[SEAL.]

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York in the Second Circuit to answer a bill of complaint exhibited against you in the said Court in a suit in equity by The John Church Co. and to further do and receive what the said Court shall have considered in this behalf, and this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars ($250).

Witness Honorable Charles M. Hough, Judge of the District Court of the United States for the Southern District of New York, on the 12th day of June in the year one thousand nine hundred and fourteen and of the Independence of the United States the one hundred and thirty-eighth.

ALEX. GILCHRIST, JR., *Clerk.*

HOUSE, GROSSMAN & VORHAUS,
115 *Broadway, Plaintiff's Solicitors.*

The defendants are required to file their answer or other defense in the above cause in the Clerk's office of this Court on or before the twentieth day after service hereof, excluding the day of said service, otherwise the bill aforesaid may be taken pro confesso.

ALEX. GILCHRIST, JR., *Clerk.*

2 *Bill of Complaint, Filed June* 12, 1914.

District Court of the United States, Southern District of New York.

In Equity.

To the Honorable Judges of the District Court of the United States for the Southern District of New York, sitting as a court of equity:

The John Church Co., a corporation duly incorporated by and under the laws of the State of Ohio, and a citizen and resident of the State of Ohio, doing business in the Borough of Manhattan, City of New York, brings this bill of complaint against the Hillard Hotel Company, a corporation duly incorporated by and under the laws of the State of New York, and a citizen and resident of the State of New York, doing business in the Borough of Manhattan, City of New York, and Henri de Martini, an alien resident of the State of New York, hereinafter designated as defendants.

Thereupon your orator complains and says:

First. This is a suit arising under the Copyright Laws of the United States.

Second. Upon information and belief, that heretofore and prior to the 23rd day of January, 1913, one John Philip Sousa, a citizen and resident of the State of New York, was the originator and composer of an original musical composition, known as a Lyric Comedy, entitled "The Glass Blowers," otherwise known as "The American Maid," which was composed by him for the purpose of public performance for profit, and that the said composition as composed contained therein a certain March entitled "From Maine to

3 Oregon," which was an integral part of the said composition, and composed as a part thereof for the purpose as aforesaid, and that the notation of an instrumentation of the said March "From Maine to Oregon" for the purpose of its production by instruments thereon designated is annexed hereto, marked "A" and made a part of this bill of complaint.

Third. That thereafter the said John Philip Sousa duly assigned and transferred to your orator all and singular his right, title and interest in and to the said musical composition entitled "The Glass Blowers," as aforesaid, and in and to the copyright thereof, including amongst its numbers the said march "From Maine to Oregon," hereinbefore referred to, and thereupon, to wit, on the 23rd day of January, 1913, your orator, as proprietor of the said musical composition, under such assignment as aforesaid, duly filed and caused to be recorded in the office of the Librarian of Congress at Washington, D. C., the title of the said musicial composition, and a certificate of the said record of the said title is annexed hereto, marked "B" and made part of this complaint, and that at the time of the recording of the said title the fee required by law was duly paid to the said Librarian of Congress.

Fourth. That thereafter, to wit, on the 11th day of February, 1913, your orator, as proprietor as aforesaid, under the assignment

aforesaid, duly filed and caused to be recorded in the office of the Librarian of Congress at Washington, D. C., the title of the said part of the said musical composition known as the said March "From Maine to Oregon" under its said designation, and that a certificate of the recording of the said title is annexed hereto, marked "C" and made a part of this complaint, and that at the time of the recording of the said title the fee required by law was duly paid to
4 said Librarian of Congress.

Fifth. That thereafter your orator duly published the said March "From Maine to Oregon," and that each copy of the said musical composition published as aforesaid had imprinted on the title page thereof the words "Copyright MCMXIII by the John Church Co."

Sixth. That thereafter, and prior to the commencement of this action, there were duly deposited in the office of the Librarian of Congress two copies of the best editions of the said composition, published as aforesaid, but that by reason of the premises your orator duly obtained a copyright under the Copyright laws of the United States upon the said musical composition for the term of twenty-eight (28) years from the date of the deposit, and the sole right and liberty of publication, producing, reproducing, copyrighting, publishing and vending such musical composition, including the said march "From Maine to Oregon."

Seventh. Upon information and belief, that the defendants wrongfully, and in violation of the copyright and right of performance obtained by your orator, to wit, on the 27th day of May, 1914, at a place known as the Hotel Vanderbilt, situate on the northwest corner of 34th Street and Park Avenue, in the Borough of Manhattan, City of New York, publicly performed for profit the said musical composition "From Maine to Oregon" by an orchestra and pursuant to the orchestration as contained in Exhibit "A" annexed hereto, and that the said performance took place in the said hotel owned and conducted by the defendant Hilliard Hotel Company, and under the leadership of the defendant Henri de Martini, conducted by him in the presence of a large audience and at a public con-
5 cert.

Eighth. That the said performance so had was without the license, authority or consent of your orator, and in violation of the copyright and performing right obtained by it as aforesaid, and to the damage of your orator in the sum of Fifty ($50) dollars.

Ninth. Upon information and belief, that the defendants have threatened and are about to continue the violations of your orator's copyright obtained as aforesaid, by public performance at the said hotel of the said musical composition annexed hereto, marked "A," and that unless enjoined and restrained from such performance this orator will sustain material injury and be seriously damaged in its copyright and performing right acquired and possessed as aforesaid, and that it will be impossible to ascertain or compute the amount of damage which may be thus sustained by your orator.

Tenth. That by reason of the premises this orator has not an adequate remedy at law.

Your orator therefore prays:

I. That process of subpœna issue herein directed to the said Hilliard Hotel Company and Henri de Martini, commanding them, and each of them, to appear and answer each and every allegation herein contained, but not under oath, an answer under oath being hereby expressly waived the same and as fully as if directly interrogated as to each.

II. That an injunction issue herein perpetually enjoining and restraining the defendants, and each of them, their attorneys,
6 agents and employees and workmen, and all claiming under them, from publicly, or otherwise, producing, reproducing or performing, or causing to be produced, reproduced or performed, the said musical composition, "From Maine to Oregon," or any imitation thereof, in whole or in part, and from in anywise infringing upon your orator's copyright to the said musical composition in any way.

III. That a preliminary injunction issue herein enjoining and restraining the defendants as prayed for in the next preceding paragraph.

IV. That your orator recover the sum of Fifty ($50) dollars for each and every performance of the said musical composition had, or which may be had, in violation of the said copyright.

V. That your orator may have such other and further relief in the premises as the equities of the case may require.

HOUSE, GROSSMAN & VORHAUS,
Solicitors for Complainant.

No. 115 Broadway, Borough of Manhattan, New York City.

WM. GROSSMAN,
Of Counsel for Complainant.

7 UNITED STATES OF AMERICA,
Southern District of New York,
County of New York, ss:

Walter Leroy Coghill, being duly sworn, deposes and says: That — is the manager of the New York branch of The John Church Co., the complainant corporation herein, and he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be based upon information and belief, and as to those matters he believes it to be true.

That the reason why this verification is not made by the complainant but by deponent is that the complainant is a foreign corporation, and that the reason why this verification is not made by an officer or director of the complainant is the fact that none of the officers or directors of the complainant corporation reside or are within the County of New York or within the Southern District of New York, and that most of the material allegations of the bill of complaint herein are due to the personal knowledge of this deponent, and as to the other facts therein alleged, information thereof has been acquired by this deponent in the course of the

From Maine to Oregon

March

Piano

From the "Glass Blowers"

JOHN PHILIP SOUSA

Brillante

Copyright, MCMXIII, by The John Church Company
International Copyright

From Maine to Oregon

March

From the "Glass Blowers"

2d Clarinet in B♭

JOHN PHILIP SOUSA

Brillante

From Maine to Oregon

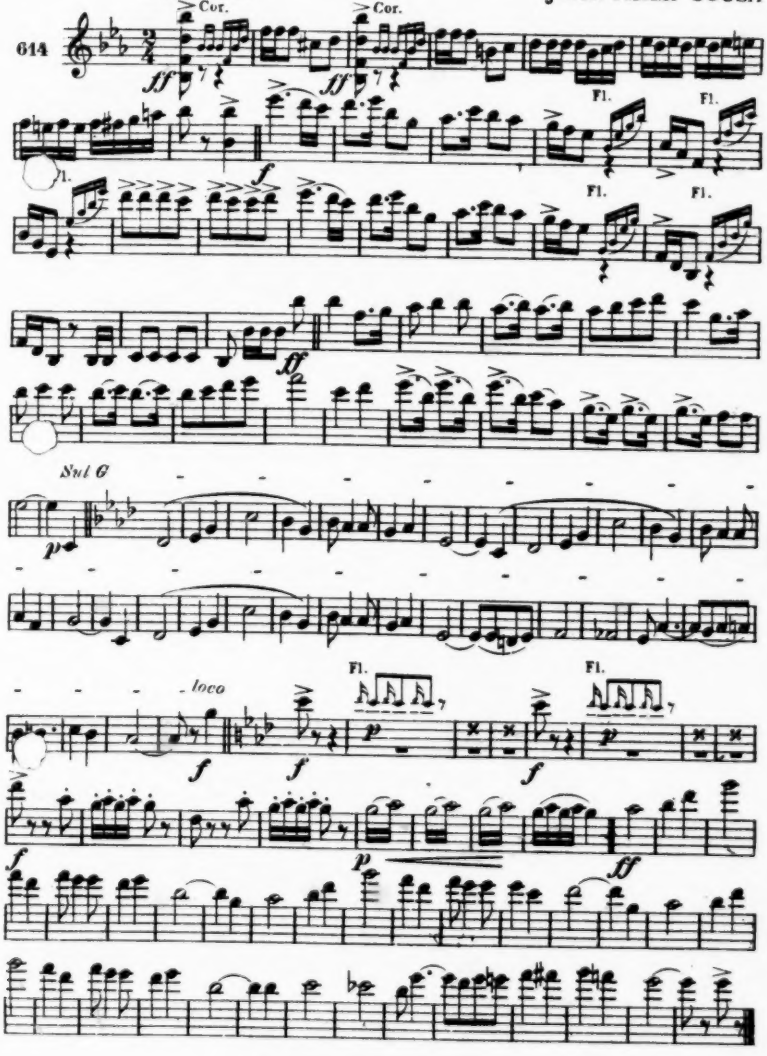
March

1st Violin

From the "Glass Blowers"

Brillante

JOHN PHILIP SOUSA



Copyright MCMXIII by The John Church Company
International Copyright

From Maine to Oregon

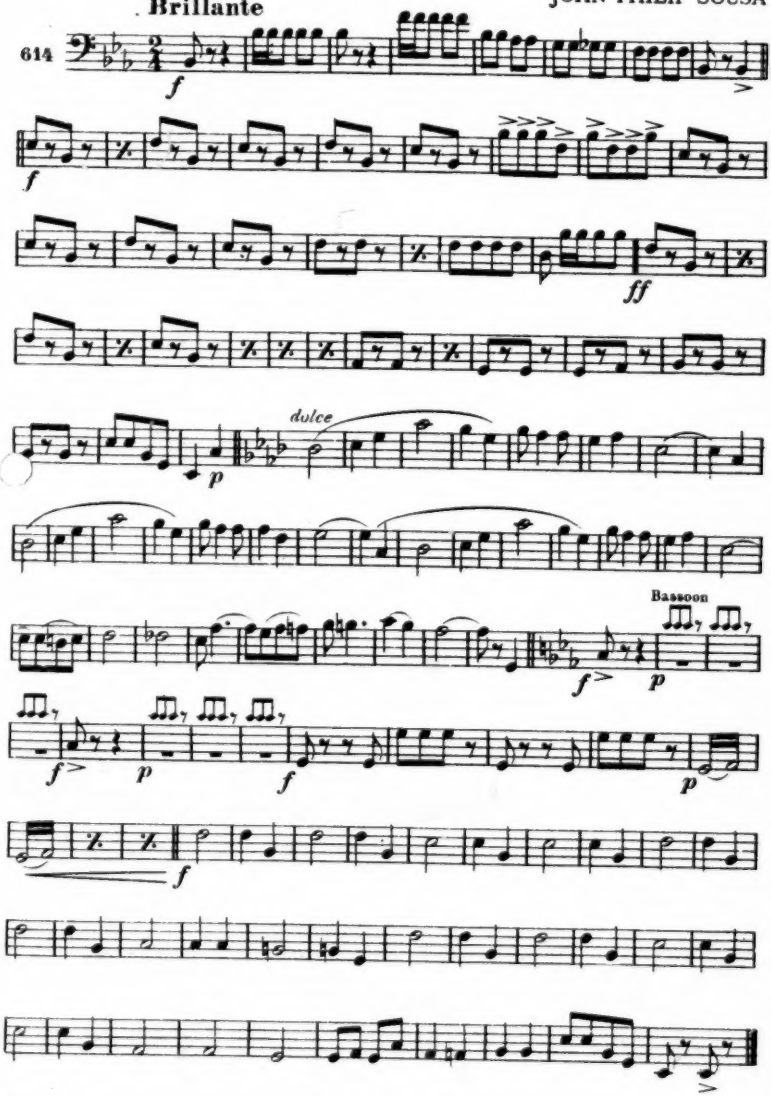
Cello

March

From the "Glass Blowers"

JOHN PHILIP SOUSA

Brillante



From Maine to Oregon

March

1st & 2d Trombones From the "Glass Blowers"

Brillante JOHN PHILIP SOUSA

From Maine to Oregon

March

From the "Glass Blowers"

Horns in F

JOHN PHILIP SOUSA

Brillante

From Maine to Oregon

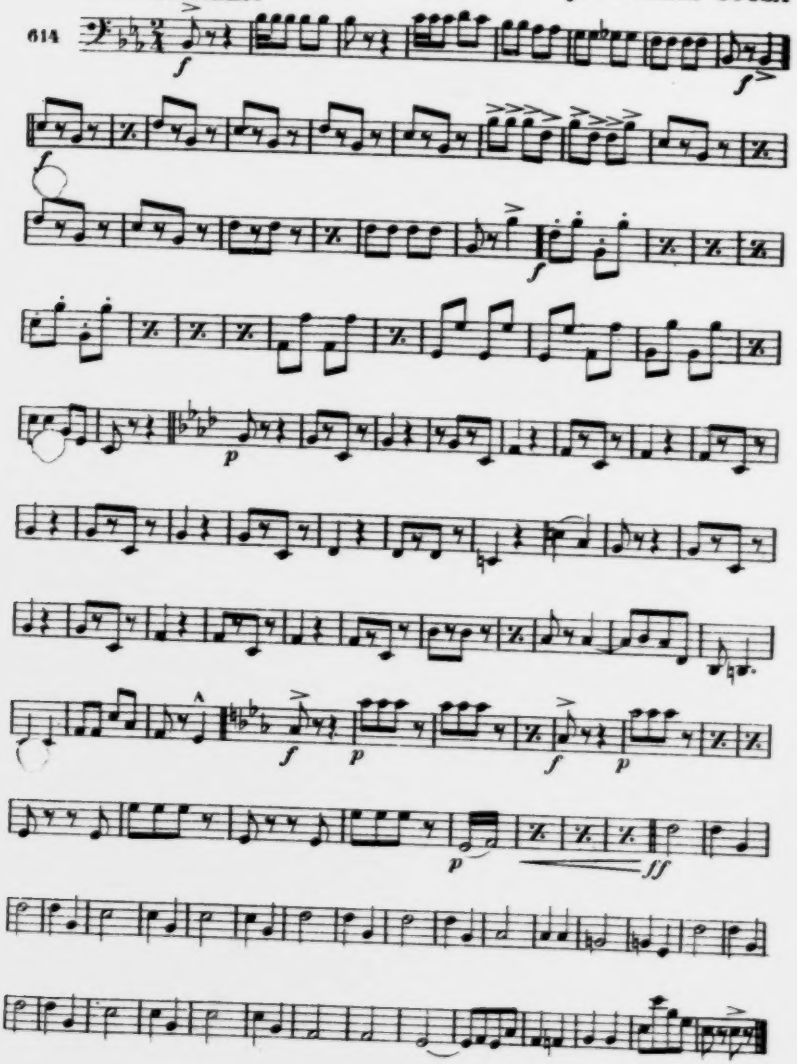
March

Bassoons

From the "Glass Blowers"

Brillante

JOHN PHILIP SOUSA



From Maine to Oregon

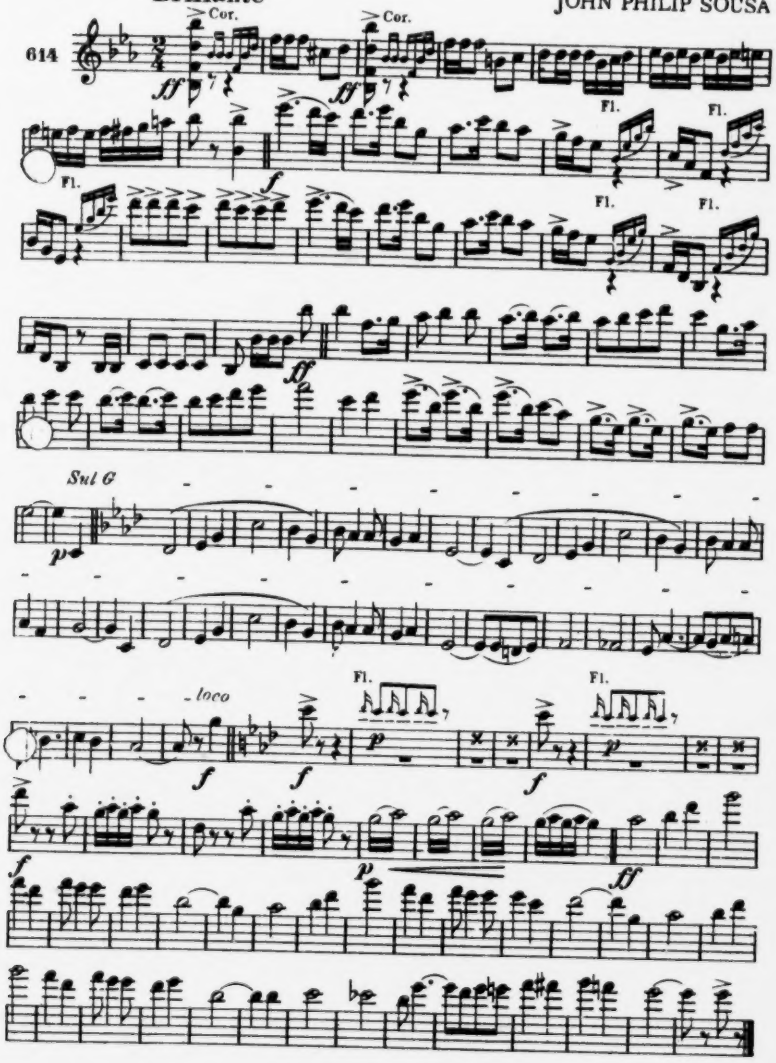
March

1st Violin

From the "Glass Blowers"

Brillante

JOHN PHILIP SOUSA



Copyright MCMXIII by The John Church Company
International Copyright

From Maine to Oregon

March

From the "Glass Blowers"

2d Violin

Brillante

JOHN PHILIP SOUSA

From Maine to Oregon

Viola

March

From the "Glass Blowers"

Brillante

JOHN PHILIP SOUSA

From Maine to Oregon

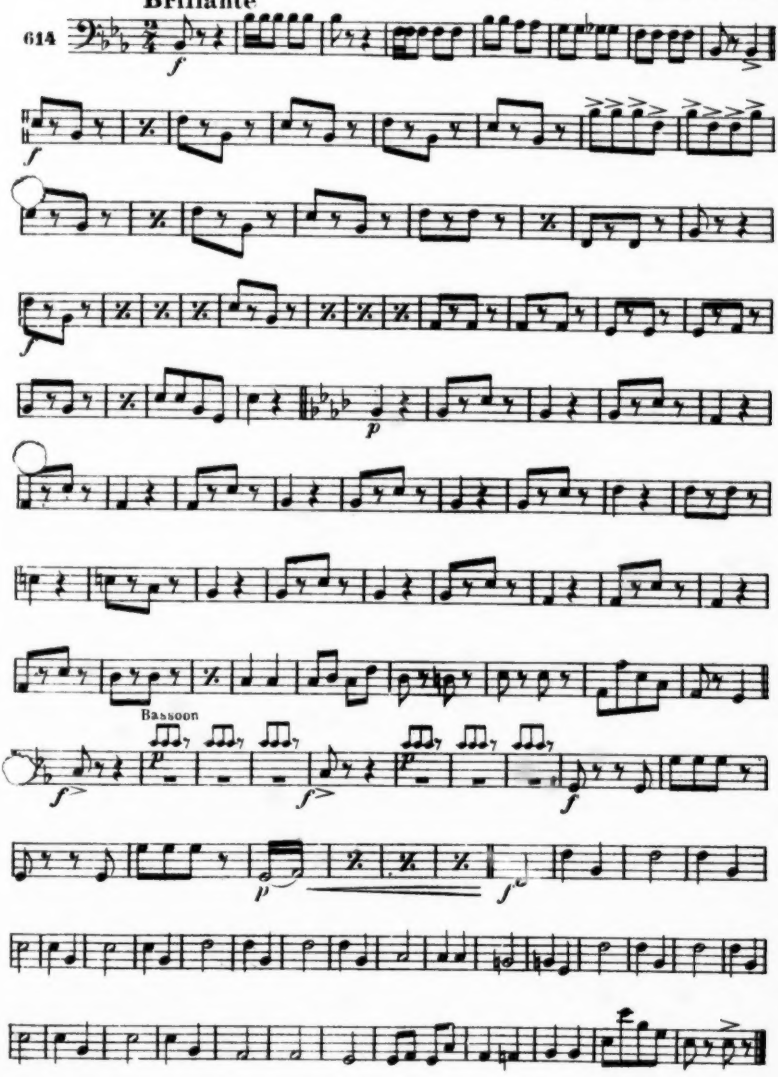
March

Bass

From the "Glass Blowers"

JOHN PHILIP SOUSA

Brillante



From Maine to Oregon

Flute & Piccolo

March

From the "Glass Blowers"

JOHN PHILIP SOUSA

Brillante

From Maine to Oregon

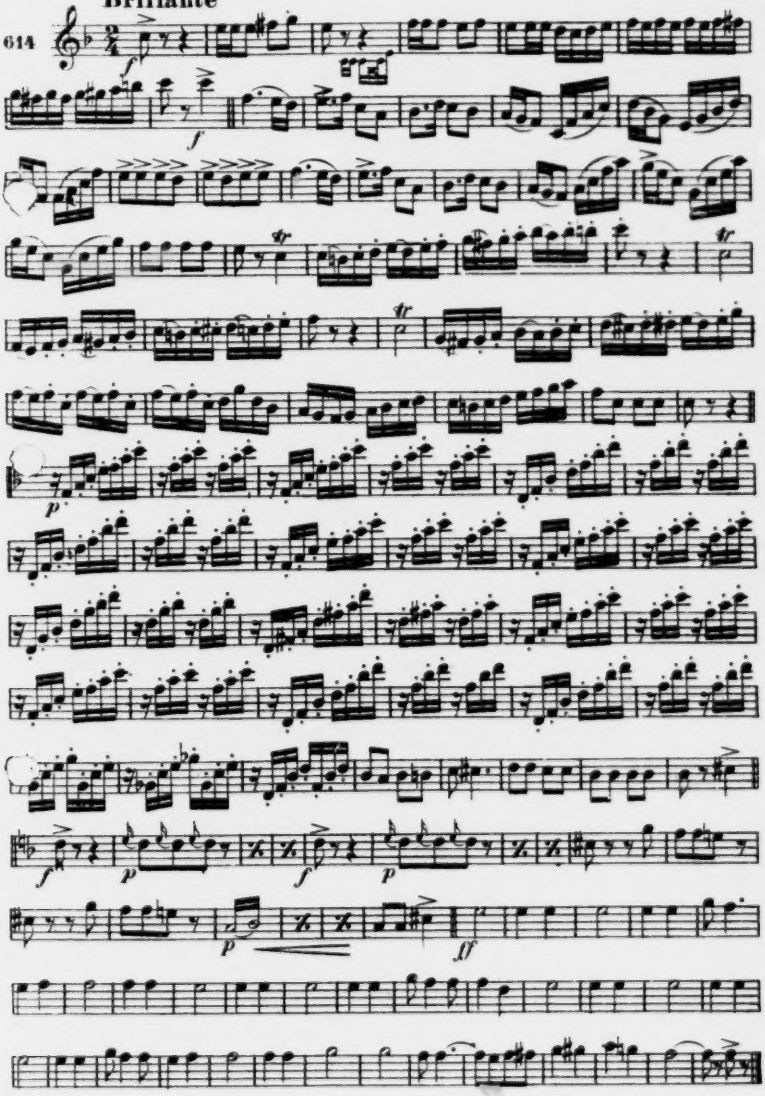
March

From the "Glass Blowers"

JOHN PHILIP SOUSA

1st Clarinet in B♭

Brillante



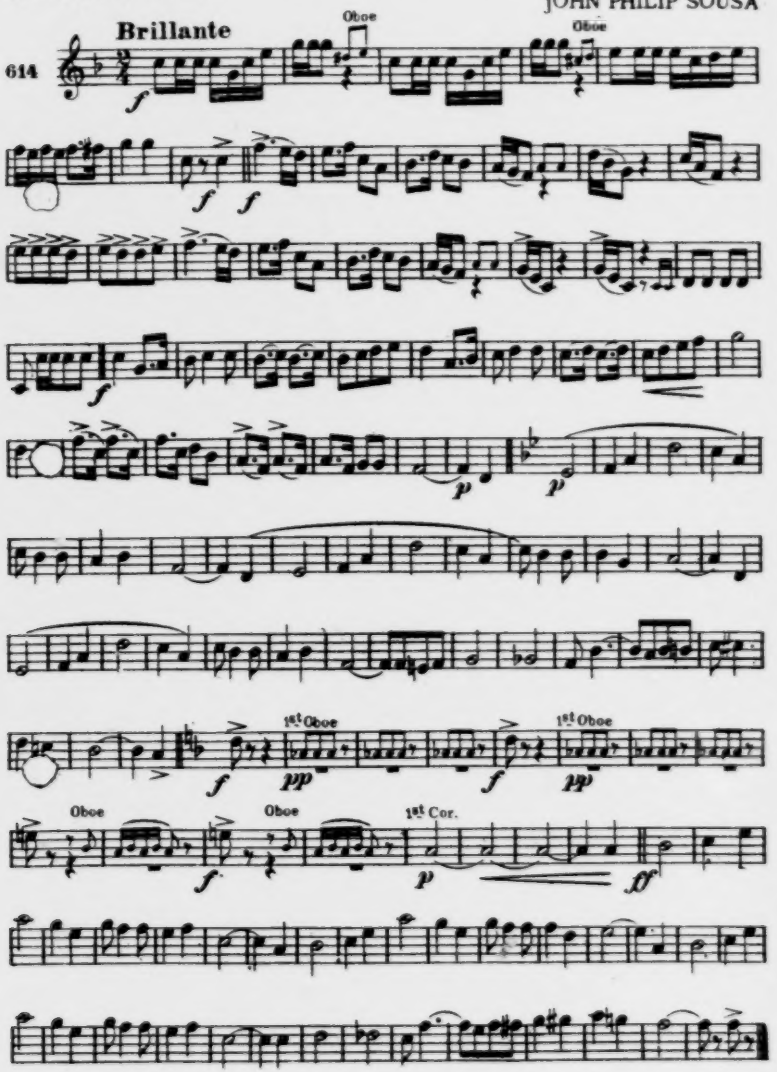
From Maine to Oregon

March

1st Cornet in B♭

From the "Glass Blowers"

JOHN PHILIP SOUSA



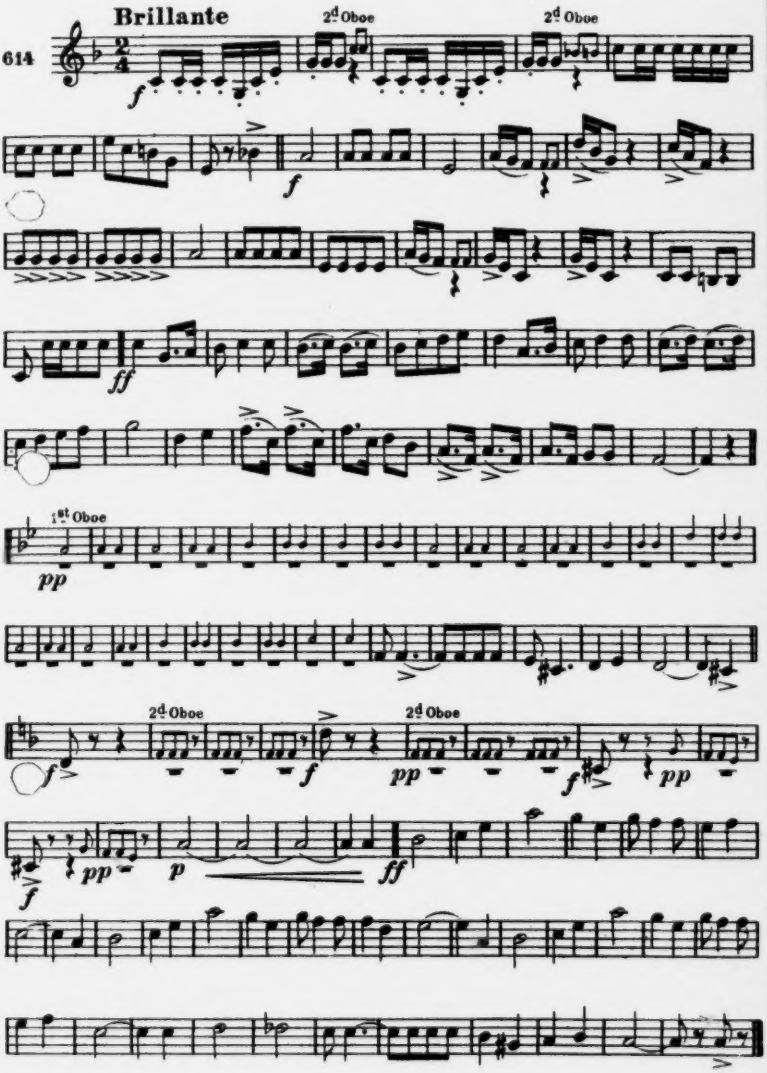
From Maine to Oregon

March

2d Cornet in B♭

From the "Glass Blowers"

JOHN PHILIP SOUSA



From Maine to Oregon

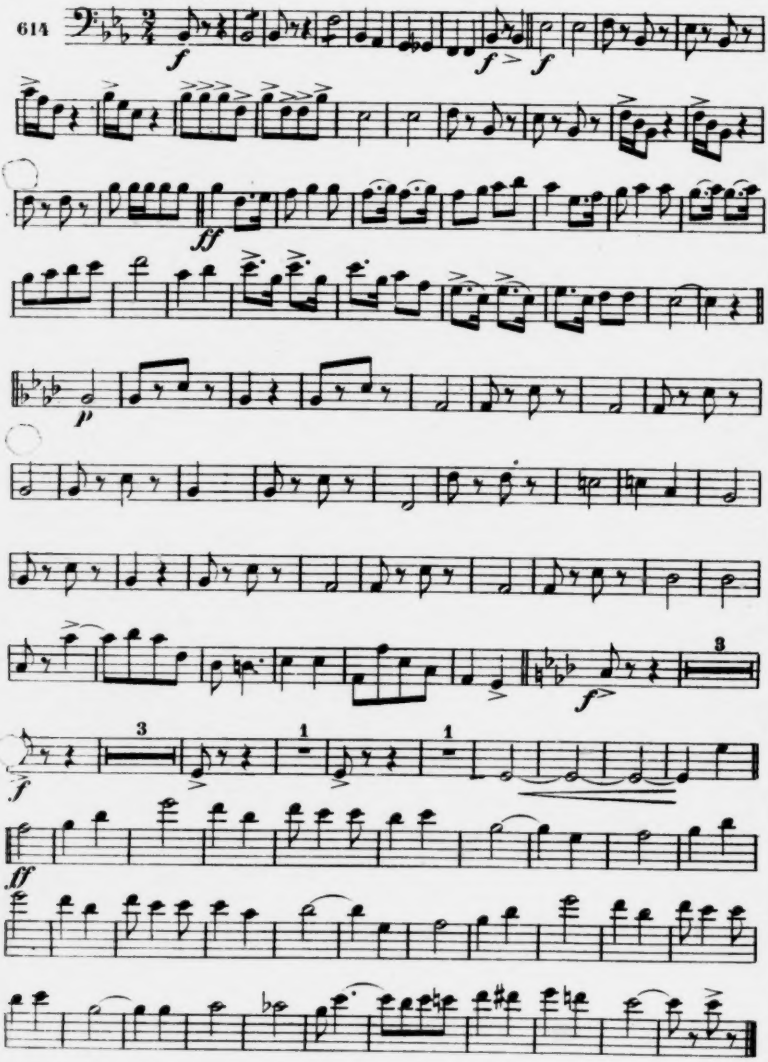
March

From the "Glass Blowers"

3d Trombone

JOHN PHILIP SOUSA

Brillante



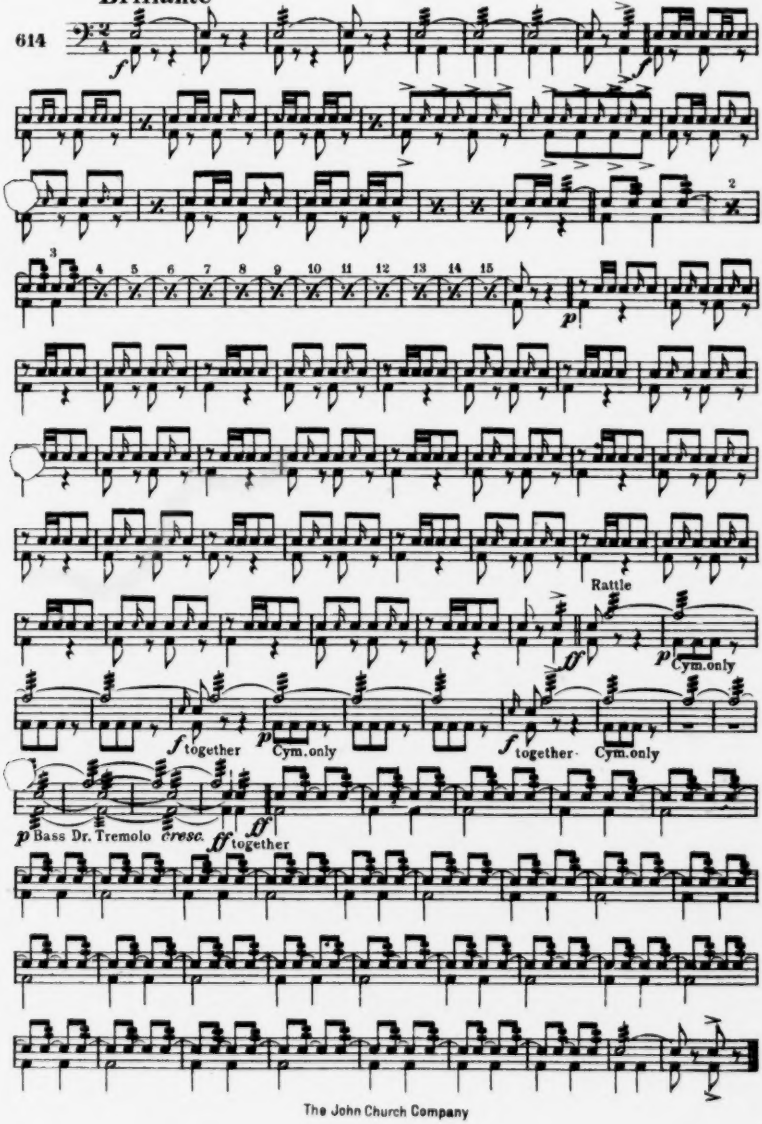
From Maine to Oregon

March

Drums

From the "Glass Blowers" JOHN PHILIP SOUSA

Brillante



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management of the complainant's business within the City of New York, and that none of the said facts are within the personal knowledge of any of the officers or directors of the complainant corporation.

WALTER LEROY COGHILL.

Sworn to before me this 11th day of June, 1914.
[SEAL.] W. J. J. CULROSS,
Notary Public No. 616, *New York County.*

8 UNITED STATES OF AMERICA,
Southern District of New York,
County of New York, ss:

Walter Leroy Coghill, being duly sworn, deposes and says: That he resides at 85 Sherman Street, in the Borough of Kings, City of New York, that he is the manager of the New York branch of The John Church Company, and is in exclusive charge of its publication business in the City of New York. That this deponent has personal knowledge of all and singular the matters contained and stated in the foregoing bill of complaint, excepting only as to the infringement on the part of the defendants therein alleged, and as to such infringements this deponent refers to the affidavits of George J. Wetzel, Thomas P. Rafferty and Lucien Courtois, annexed hereto.

WALTER LEROY COGHILL.

Sworn to before me this 11th day of June, 1914.
[SEAL.] W. J. J. CULROSS,
Notary Public No. 616, *New York County.*

9 EXHIBIT A.

(Music.)

(Here follows sheet music marked A to S.)

10 EXHIBIT B.

Copyright Office of the United States of America,

Library of Congress,

Washington, D. C.

Certificate of Copyright Registration.

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright, approved March 4, 1909, that two copies of the musical composition named

herein have been deposited in this Office under the provisions of the said Act, and that an entry for copyright for the first term of 28 years from the date of publication thereof has been duly registered in the name of The John Church Company, Cincinnati, Ohio (name and address of claimant), musical composition entitled The Glass Blowers. A lyrical comedy. Book by Leonard Liebling. Music by John Philip Sousa. Vocal score.

Date of publication, January 23, 1913.

Copies received January 23, 1913.

Entry: Class E, XXc, No. 304286.

[SEAL.] ERNEST BRUNCKEN,
Assistant Register of Copyrights.

11 EXHIBIT C.

Copyright Office of the United States of America,

Library of Congress,

Washington, D. C.,

Certificate of Copyright Registration.

This is to certify, In conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright, approved March 4, 1909, that two copies of the Musical Composition named herein have been deposited in this Office under the provisions of the said Act, and that an entry for copyright for the first term of 28 years from the date of publication thereof has been duly registered in the name of The John Church Company, Cincinnati, Ohio (name and address of claimant) Musical Composition entitled From Maine to Oregon. March from the "Glass Blowers" by John Philip Sousa, of United States. Full orchestra.

Date of publication, February 11, 1913.

Copies received, February 11, 1913.

Entry, Class E. XXc, No. 304858.

[SEAL.] ERNEST BRUNCKEN,
Assistant Register of Copyrights.

12 *Answer of Defendant Hilliard Hotel Company, Filed March 6, 1915.*

District Court of the United States, Southern District of New York.

THE JOHN CHURCH COMPANY, Complainant,
against
HILLIARD HOTEL COMPANY and HENRI DE MARTINI, Defendants.

Hilliard Hotel Company, one of the defendants, answering the bill of complaint herein:

First. Denies each and every allegation contained in paragraph marked "Seventh" of the bill of complaint herein, except that this

defendant admits that the said musical composition "From Maine to Oregon" was performed by an orchestra and pursuant to the orchestration as contained in Exhibit "A" annexed to the bill of complaint, and that said performance took place in the said hotel owned and conducted by the defendant Hilliard Hotel Company and under the leadership of the defendant Henri de Martini.

Second. Denies each and every allegation contained in paragraphs marked "Eighth" and "Ninth" of the bill of complaint herein.

13 For a first separate and distinct defense to the alleged cause of action contained in the bill of complaint herein, this defendant alleges:

Third. That the complainant, The John Church Company, published the musical composition entitled "From Maine to Oregon," mentioned and described in the bill of complaint herein, and sold copies thereof to this defendant and the public generally.

Fourth. That by virtue thereof this defendant was authorized and empowered by the complainant to perform said musical composition or cause same to be performed in the dining-room of the Vanderbilt Hotel in the Borough of Manhattan, City of New York, as herein set forth.

Fifth. That no charge was made by this defendant for admission to the dining-room in which said music was performed, nor for the privilege of hearing such performance. No additional charge was made for meals furnished at the time when such music was performed over the charge made when there was no music.

For a second separate and distinct defense to the alleged cause of action contained in the bill of complaint herein, this defendant alleges:

Sixth. That the musical composition entitled "From Maine to Oregon," mentioned and described in the bill of complaint herein, was not performed or caused to be performed by this defendant publicly for profit.

14 For a third separate and distinct defense to the alleged cause of action contained in the bill of complaint herein, this defendant alleges:

Seventh. That the bill of camplaint herein does not state facts sufficient to constitute a cause of action under the Copyright Act approved March 4, 1909, as amended.

Wherefore, the defendant Hilliard Hotel Company prays that the bill of complaint herein may be dismissed, with costs.

HILLIARD HOTEL COMPANY,
By CAMPBELL & BOLAND, *Solicitors.*

51 Chambers Street, Borough of Manhattan, City of New York.

CHARLES J. CAMPBELL,
Of Counsel.

15 *Answer of Defendant de Martini, Filed March 6, 1915.*

District Court of the United States, Southern District of New York.

THE JOHN CHURCH COMPANY, Complainant,
against
HILLIARD HOTEL COMPANY and HENRI DE MARTINI, Defendants.

Henri de Martini, one of the defendants, answering the bill of complaint herein:

First. Denies each and every allegation contained in paragraph marked "Seventh" of the bill of complaint herein, except that this defendant admits that the said musical composition "From Maine to Oregon" was performed by an orchestra and pursuant to the orchestration as contained in Exhibit "A" annexed to the bill of complaint, and that said performance took place in the said hotel owned and conducted by the defendant Hilliard Hotel Company and under the leadership of the defendant Henri de Martini.

Second. Denies each and every allegation contained in paragraphs marked "Eighth" and "Ninth" of the bill of complaint herein.

16 For a first separate and distinct defense to the alleged cause of action contained in the bill of complaint herein, this defendant alleges:

Third. That the complainant, The John Church Company, published the musical composition entitled "Form Maine to Oregon," mentioned and described in the bill of complaint herein, and sold copies thereof to this defendant and the public generally.

Fourth. That by virtue thereof this defendant was authorized and empowered by the complainant to perform said musical composition or cause same to be performed in the dining-room of the Vanderbilt Hotel, in the Borough of Manhattan, City of New York, as herein set forth.

Fifth. That no charge was made by this defendant for admission to the dining-room in which said music was performed, nor for the privilege of hearing such performance. On information and belief, that no additional charge was made for meals furnished at the time when such music was performed over the charge made when there was no music.

For a second separate and distinct defense to the alleged cause of action contained in the bill of complaint herein, this defendant alleges:

Sixth. That the musical composition entitled "From Maine to Oregon," mentioned and described in the bill of complaint herein, was not performed or caused to be performed by this defendant publicly for profit.

17 For a third separate and distinct defense to the alleged cause of action contained in the bill of complaint herein, this defendant alleges:

Seventh. That the bill of complaint herein does not state facts

sufficient to constitute a cause of action under the Copyright Act approved March 4, 1909, as amended.

Wherefore, the defendant Henri de Martini prays that the bill of complaint herein may be dismissed, with costs.

HENRI DE MARTINI,
By CAMPBELL & BOLAND, *Solicitors.*

51 Chambers Street, Borough of Manhattan, City of New York.

CHARLES J. CAMPBELL,
Of Counsel.

18 *Notice of Motion to Dismiss, Filed May* 14, 1915.

District Court of the United States, Southern District of New York.

In Equity.

THE JOHN CHURCH CO., Complainant,
against
HILLIARD HOTEL COMPANY and HENRI DE MARTINI, Defendants.

SIRS: Please to take notice that upon the annexed affidavit of Charles J. Campbell, verified the 4th day of May, 1915, and the stipulated statement of facts thereto annexed and made a part thereof, and upon the pleadings and all other papers and proceedings herein, a motion will be made before one of the Judges of the United States District Court for the Southern District of New York, at a Term of the said Court for the hearing of motions, to be held at the Post Office Building, in the Borough of Manhattan, City of New York, on the 14th day of May, 1915, at 10.30 o'clock A. M., or as soon thereafter as counsel can be heard, for a final judgment or decree dismissing the complaint herein against both defendants, with costs, and for such other and further relief as the Court may deem just.

Dated, New York, May 5, 1915.

Yours, &c.,

CAMPBELL & BOLAND,
Solicitors for Defendants.

51 Chambers Street, New York City.

19 To House, Grossman & Vorhaus, Esqs., Solicitors for Complainant, 115 Broadway, New York City.

Affidavit of Charles J. Campbell, Filed May 14, 1915.

District Court of the United States, Southern District of New York.

In Equity.

THE JOHN CHURCH CO., Complainant,
against
HILLARD HOTEL COMPANY and HENRI DE MARTINI, Defendants.

UNITED STATES OF AMERICA,
Southern District of New York,
County of New York, City of New York, ss:

Charles J. Campbell, being duly sworn, says that he resides in Pleasantville, Westchester County, New York; that he is a member of the law firm of Campbell & Boland, solicitors for the defendants in this action which is brought, in equity, for the purpose of procuring an injunction perpetually restraining the defendants from publicity performing a musical composition entitled "From
20 Maine to Oregon" and for damages, for an alleged violation of the complainant's copyright in and to the said musical composition.

That issue was joined herein by serving upon the solicitors for the complainant, and by filing with the Clerk of this Court on March 6, 1915, the answer of each of the defendants; and this cause is now awaiting final hearing on the calendar of this Court.

That annexed hereto and forming a part of the moving papers herein, as though fully set forth in this affidavit, is a statement of all the facts involved in this action, stipulated and agreed to by the solicitors for the complainant and all of the defendants herein.

That heretofore and on the 31st day of August, 1914, upon motion of the solicitors for the complainant herein, this Court made an order herein enjoining and restraining the defendants from publicly playing or performing the said copyrighted musical composition until the further order of this Court.

That an appeal was subsequently taken to the United States Circuit Court of Appeals for the Second Circuit from the said order, as a result of which the said order was vacated and set aside by the said United States Circuit Court of Appeals on the 10th day of February, 1915, the said Court holding that the performance of said copyrighted music by the defendants herein was not a public performance for profit within the meaning and intent of the Copyright Act of the United States and therefore did not infringe the copyright of the complainant herein.

21 Upon this affidavit, and the stipulated statement of facts hereto annexed and made a part hereof, and upon the pleadings and all other papers and proceedings herein, the defendants now move and respectfully petition this Court for a final judgment and decree dismissing the bill of complaint of the complainant, the John Church Company, against each of the defendants herein, with

costs, and for such other and further relief as the Court may deem just.

No other application has been made for the relief herein sought.

CHARLES J. CAMPBELL.

Sworn to before me this 4th day of May, 1915.

[SEAL.] HANNAH R. FRANK,
Commissioner of Deeds, New York City.

22 *Stipulation as to Facts, Filed August* 13, 1914.

District Court of the United States, Southern District of New York.

THE JOHN CHURCH CO., Plaintiff,
against
HILLIARD HOTEL COMPANY and HENRI DE MARTINI, Defendants.

The following are hereby consented to and stipulated as the existing facts in this action, for the purpose of submission thereof to, and its determination thereon by the Court, and for a final judgment to be rendered thereon:

First. That prior to the 23rd day of January, 1913, one John Philip Sousa, a citizen and resident of the State of New York, was the originator and composer of an original musical composition known as Lyric Comedy, entitled "The Glass Blowers," known as "The American Maid," which was composed by him for the purpose of public performance for profit, and that the said composition as thus composed contained a certain march, entitled, "From Maine to Oregon," which was an integral part thereof, and composed for the purpose aforesaid, and that Exhibit "A" annexed to the bill of complaint herein is a correct notation of an instrumentation of the said March "From Maine to Oregon" for the purpose of its production by musical instruments.

23 Second. That thereafter the said John Philip Sousa duly assigned and transferred to the complainant, which is a corporation, duly incorporated by and under the Laws of the State of Ohio, all and singular his right, title and interest in and to the said musical composition, entitled, "The Glass Blowers," and the said march hereinbefore described, and in and to the copyright thereof, and that thereupon on the 23rd day of January, 1913, the complainant, as proprietor of said musical composition under such assignment as aforesaid, duly filed and caused to be recorded in the office of the Librarian of Congress at Washington, D. C., the title of said musical composition and paid the fee required by law for the purpose of obtaining a copyright.

Third. That thereafter, to wit, on the 11th day of March, 1913, the complainant as proprietor as aforesaid, duly filed and caused to be recorded in the office of the Librarian of Congress at Washington, D. C., the title of the said march, "From Maine to Oregon," under that designation and paid the fee required to obtain a copyright.

Fourth. That thereafter the complainant published the said march, "From Maine to Oregon," and that each copy of the musical composition thus published had imprinted on the title page thereof the words, "Copyright MCMXIII by the John Church Co."

Fifth. That thereafter, and prior to the commencement of this action, there was duly deposited in the office of the *office* Librarian of Congress two copies of the best edition of the said composition, published as aforesaid, and that by reason of the premises the complainant obtained a copyright under the Copyright Laws of
24 the United States upon the said musical composition, "From Maine to Oregon," which was separately published, and sold to the defendant Hilliard Hotel Company, and the public generally.

Sixth. That the defendant Hilliard Hotel Company is a domestic corporation, created by and under the Laws of the State of New York, conducting and carrying on a hotel known as the Vanderbilt Hotel, situate at the corner of Park Avenue and 34th Street, in the Borough of Manhattan, City of New York, for the accommodation of travelers and guests, and that the defendant Henri de Martini is the leader of an orchestra employed by the defendant corporation and paid by it for services rendered in conducting an orchestra consisting of musicians, also paid by the defendant corporation, for the purpose of the entertainment of its guests by furnishing music in the dining room of the said hotel during mealtimes. No charge was made by defendant or its said leader for admission to the dining room in which said music was performed as aforesaid, nor for the privilege of hearing such performance. No additional charge was made for meals furnished at the time when such music was performed, over the charge made when there was no music.

Seventh. That on the 27th day of May, 1914, at the said Hotel Vanderbilt, the said defendant Henri de Martini, acting as the leader of said orchestra under said employment, for and in behalf of the defendant corporation, and by its authority and consent, caused to be performed by said musicians in the dining room of said hotel for the entertainment and in the presence of the guests
25 thereof, without any charge to them as aforesaid, the said musical composition, "From Maine to Oregon," the copyright whereof is owned by the complainant as aforesaid.

Eighth. That the said performance was without the express authority or consent of the complainant.

Ninth. That the defendants at the time of the commencement of this action intended to cause to be given similar performances at the said Hotel Vanderbilt, for the purpose and in the manner hereinbefore described, and without the express authority and consent of the complainant.

Dated, New York, N. Y., March 5, 1915.

HOUSE, GROSSMAN & VORHAUS,
Solicitors for Complainant.
CAMPBELL & BOLAND,
Solicitors for Defendants.

26 *Final Decree Dismissing Complaint, Filed May* 14, 1915.

At a Stated Term of the United States District Court for the Southern District of New York, Held at the Court House, Post-Office Building, Borough of Manhattan, City of New York, on the 14th Day of May, 1915.

In Equity.

Present: Hon. Julius M. Mayer, Judge.

THE JOHN CHURCH CO., Complainant,
against
HILLARD HOTEL COMPANY and HENRI DE MARTINI, Defendants.

The defendants having moved herein upon notice of motion, dated May 5, 1915, the affidavit of Charles J. Campbell, duly verified the 4th day of May, 1915, and the stipulated statement of facts, both annexed to said notice of motion and made a part thereof, and upon the pleadings and all other papers and proceedings had herein, for a final judgment or decree dismissing the bill of complaint herein against both defendants, with costs, and for such other and further relief as to the Court may seem just; and said notice of motion having been made returnable on the 14th day of May, 1915,
and coming duly on to be heard on said day; and the Court
27 having heard Charles J. Campbell, Esq., of counsel for the defendants, and Charles Goldzier, Esq., of counsel for the complainant; and due deliberation having been had, it is

Ordered, adjudged and decreed that the said bill of complaint herein be, and the same hereby is, dismissed against both defendants, with costs to each of said defendants, to be taxed.

JULIUS M. MAYER,
U. S. District Judge.

28 *Petition for Appeal and Order Allowing Same, Filed November* 12, 1915.

District Court of the United States, Southern District of New York.

In Equity.

THE JOHN CHURCH CO., Complaintant,
against
HILLIARD HOTEL COMPANY and HENRI DE MARTINI, Defendants.

To the Honorables the Judges of the United States Circuit Court of Appeals for the Second District:

The John Church Co., the complainant above named, conceiving itself aggrieved by the decree of this Court, made and entered in the above-entitled action, and filed in the office of the Clerk of this

Court during the May Term, 1915, hereby appeals from said decree, to the United States Circuit Court of Appeals for the Second Circuit, and states that its reasons for said appeal are specified in the assignment of errors filed herewith, and therefore prays that this appeal may be allowed and a citation granted directed to the above-named defendant, Hilliard Hotel Company, commanding it to appear before such Circuit Court of Appeals, and to do and receive what may appertain to justice to be done in the premises, and that
29 a transcript of the record and of the proceedings and papers upon which said decree was made, after due authentication, may be sent to the United States Circuit Court of Appeals for the second District.

Dated, New York, November 11th, 1915.

HOUSE, GROSSMAN & VORHAUS,
Solicitors for the Complainant-Appellant.

Office & P. O. Address, 115 Broadway, N. Y. City.

It is ordered, that the said appeal be allowed as prayed for, this 12th day of November, 1915.

C. M. HOUGH, *U. S. D. J.*

A. G., Jr.

30 *Stipulation Waiving Bond, Filed September* 26, 1914.

District Court of the United States, Southern District of New York.

In Equity.

THE JOHN CHURCH CO., Complainant,
against
HILLIARD HOTEL COMPANY and HENRI DE MARTINI, Defendants.

The giving or filing of any bond or undertaking upon the proposed appeal herein, is hereby waived.

Dated, November 11th, 1915.

CAMPBELL & BOLAND,
Solicitors for Defendants.

31 *Citation, Filed November* 15, 1915.

By the Honorable Charles M. Hough, one of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit, to The Hilliard Hotel Company and Mr. Henri de Martini, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York, in the District and Circuit above named, on the 11th day

of December, 1915, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Southern District of New York, wherein John Church Co. is appellant, and you are appellees, to show cause, if any *they* be, why the decree in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 12th day of November, in the year of our Lord One Thousand Nine Hundred and Fifteen, and of the Independence of the United States the One Hundred and Fortieth.

C. M. HOUGH,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

A. G., JR.

32 *Assignments of Errors, Filed November* 12, 1915.

District Court of the United States, Southern District of New York.

In Equity.

THE JOHN CHURCH CO., Complainant,
against
HILLIARD HOTEL COMPANY and HENRI DE MARTINI, Defendants.

The above-named complainant, The John Church Co., having appealed to the United States Circuit Court of Appeals for the Second Circuit from the final decree of this Court dismissing the bill of complaint made and entered in the above-entitled cause during the May Term, 1915, respectfully alleges and makes the following assignment of errors:

1st. The Court erred in determining that the plaintiff had failed to prove a cause of action.

2nd. The Court erred in refusing to the complainant any of the relief prayed for in its bill of complaint in said action.

3rd. The Court erred in dismissing the complainant's bill of complaint and granting judgment to the defendants for the costs of the action.

Wherefore, the complainant prays that the said decree of dismissal be reversed.

Dated, New York, November 11th, 1915.

HOUSE, GROSSMAN & VORHAUS,
Solicitors for Complainant-Appellant.

Office & Post Office Address, No. 115 Broadway, Borough of Manhattan, City of New York.

33 *Stipulation.*

United States District Court, Southern District of New York.

In Equity.

THE JOHN CHURCH CO., Complainant,
against
HILLIARD HOTEL COMPANY and HENRI DE MARTINI, Defendants.

It is hereby stipulated and agreed by the undersigned solicitors for the parties herein, that the foregoing and annexed printed record is a true transcript of the record upon appeal to the United States Circuit Court of Appeals, Second Circuit, as agreed upon by the parties.

Dated, New York, November 30, 1915.

HOUSE, GROSSMAN & VORHAUS,
Solicitors for Complainant-Appellant.
CAMPBELL & BOLAND,
Solicitors for Defendants-Appellees.

34 *Clerk's Certificate.*

United States District Court, Southern District of New York.

THE JOHN CHURCH CO., Complainant,
against
HILLIARD HOTEL COMPANY and HENRI DE MARTINI, Defendants.

UNITED STATES DISTRICT COURT,
Southern District of New York, ss:

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America, for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled cause as agreed upon by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this — day of November, in the year of our Lord, one thousand, nine hundred and fifteen, and of the independence of the United States, the one hundred and fortieth.

—— ——, *Clerk.*

35 United States Circuit Court of Appeals for the Second Circuit, October Term, 1915.

No. 204.

Submitted December 23, 1915; Decided December 27, 1915.

Before Lacombe, Ward and Rogers, Circuit Judges.

THE JOHN CHURCH COMPANY, Complainant-Appellant,
vs.
HILLIARD HOTEL COMPANY and HENRI DE MARTINI, Defendants-Appellees.

Appeal from the District Court of the United States for the Southern District of New York.

Appeal from Decree Dismissing Bill for Alleged Infringement of Copyright.

Per CURIAM:

Decree affirmed with costs.
Submitted without argument.

36 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, Held at the Court-rooms in the Post-office Building in the City of New York, on the 6th Day of January One Thousand Nine Hundred and Sixteen.

Present: Hon. E. Henry Lacombe, Hon. Henry G. Ward, Hon. Henry Wade Rogers, Circuit Judges.

JOHN CHURCH COMPANY, Complainant-Appellant,
vs.
HILLIARD HOTEL COMPANY and Another, Defendants-Appellees.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and hereby is affirmed with costs.

E. H. L.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

37 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. John Church Co. vs. Hilliard Hotel Co. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 6, 1916. William Parkin, Clerk.

38 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 37 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of John Church Company against Hilliard Hotel Company & another, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 27th day of January in the year of our Lord One Thousand Nine Hundred and Sixteen, and of the Independence of the said United States the One Hundred and Fortieth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

[10-cent U. S. revenue stamp, canceled.]

39 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The John Church Company is appellant, and Hilliard Hotel Company and Henri de Martini are appellees, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command
40 you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fourteenth day of April in the year of our Lord One Thousand Nine Hundred and Sixteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 25,213. Supreme Court of the United States, October Term, 1915. No. 930. The John Church Company vs. Hilliard Hotel Company et al. Writ of Certiorari.

41 United States Supreme Court.

JOHN CHURCH CO., Appellants,
against
HILLIARD HOTEL CO. and HENRI DE MARTINI, Appellees.

It is hereby stipulated and agreed by and between the attorneys for the respective parties that the transcript of record on file in the above matter may be taken as the return to the writ.

Dated, New York, April 18th, 1916.

HOUSE, GROSSMAN & VORHAUS,
Attorneys for Appellants.
CAMPBELL & BOLAND,
Attorneys for Appellees.

42 To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of th Supreme Court of the United States, a copy of the stipulation of counsel is hereunto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York, April 18th, 1916.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[10-cent U. S. revenue stamp, canceled.]

43 [Endorsed:] 930/25213. United States Circuit Court of Appeals, Second Circuit. John Church Company v. Hilliard Hotel Company. Return to Certiorari.

44 [Endorsed:] File No. 25,213. Supreme Court U. S., October Term, 1915. Term No. 930. The John Church Company, Petitioner, vs. Hilliard Hotel Company et al. Writ of certiorari and return. Filed April 21, 1916.

OCT 2
JAMES D.

Supreme Court of the United States

OCTOBER TERM, 1916—No. 433.

THE JOHN CHURCH CO.,
Complainant-Appellant,

against

HILLIARD HOTEL COMPANY and HENRI DE MARTINI,
Defendants-Appellees.

AFFIDAVIT AND NOTICE OF MOTION TO ADVANCE CAUSE ON DOCKET AND SET DOWN FOR A DAY CERTAIN.

MOSES H. GROSSMAN,
WILLIAM GROSSMAN,
LOUIS J. VORHAUS,
Solicitors for Complainant-Appellant.

The Hecla Press, 57 Warren St., N. Y. Tel. 6280 Barclay.

Supreme Court of the United States

1

THE JOHN CHURCH CO.,
Complainant-Appellant,

against

HILLIARD HOTEL COMPANY and
HENRI DE MARTINI,
Defendants-Appellees.

Sirs:

PLEASE TAKE NOTICE that upon the record herein filed in the above-entitled court, and all proceedings herein, and the annexed affidavit, a motion will be made before this Honorable Court at a Term thereof, to be held at the Capitol, in the City of Washington, District of Columbia, on the 30th day of October, 1916, at the opening of the court, or as soon thereafter as counsel may be heard, for an order advancing the above-entitled cause, No. 433, October Term, 1916, upon the docket of the said court and setting it down for a day certain for argument, and for such other and further order or relief as may be just.

2

Dated, New York, October 13, 1916.

Yours, etc.,

3

MOSES H. GROSSMAN,
WILLIAM GROSSMAN,
LOUIS J. VORHAUS,
Solicitors for Complainant-Appellant,
Office & P. O. Address,
No. 115 Broadway,
Borough of Manhattan,
City of New York.

To:
CAMPBELL & BOLAND, Esqs.,
Solicitors for Defendants-Appellees.

SUPREME COURT OF THE UNITED STATES.

THE JOHN CHURCH CO.,
Complainant-Appellant,

against

HILLIARD HOTEL COMPANY and
HENRI DE MARTINI,
Defendants-Appellees.

STATE OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF NEW YORK, } ss:

WALTER LEROY COGHILL, being duly sworn, deposes and says: That he is the Manager of the New York branch of THE JOHN CHURCH CO., the complainant-appellant herein, and resides in the Borough of Manhattan, City of New York, State of New York.

Deponent further says that this is an appeal prosecuted by writ of certiorari from this court for the review of a decision of the United States Circuit Court of Appeals, for the Second Circuit, dismissing the complainant's complaint.

Deponent further says that the action was brought in the District Court of the United States for the Southern District of New York under the Copyright Law of the United States, for the pur-

pose of enjoining the defendants from producing 7
a certain musical composition entitled "From Maine to Oregon," being part of an operetta entitled "The Glass Blowers," copyright whereof is owned by the complainant, upon the ground that the said musical composition was publicly performed for profit at a hotel in the Borough of Manhattan, City of New York, without the consent of the complainant, the owner of the copyright.

Deponent further says that the said bill of complaint was dismissed by the District Court upon the ground that such performance was not a public performance for profit within the purview of the Copyright Act, and the dismissal of the complaint was upheld by the said Circuit Court of Appeals 8
upon that ground, pursuant to an opinion duly filed and appearing of record herein.

Deponent further says that the record upon the said appeal herein has been duly filed with this court, and that the cause is upon the docket of this court as of the October Term, 1915.

Deponent further says that the question involved in the appeal herein is of great interest to owners of copyrights and hotel-keepers throughout the United States, in view of the fact that in acceptance of the said decision and opinion a large number of hotel-keepers throughout the United States have publicly performed, and are performing, copyrighted musical and dramatico musical compositions without any authority from the several own- 9
ers of the copyrights, or the payment of any royalty or compensation for such performances.

Deponent further says that the complainant is engaged in the business of the publication, licensing and sale of copyrighted compositions, and its trade extends throughout the United States; that it is the owner of a large number of copyrighted musical

10 and dramatico musical compositions which have been and are being thus performed without the authority of the complainant, and that by reason thereof the complainant and other owners and proprietors of copyrights have lost and continue to lose large sums of money which might be obtained if it be eventually determined by this court that performances at hotels come within the purview of the Copyright Act, and that the owners of copyrights are protected against such public performance unless they be given with their consent and upon the payment of an adequate compensation for such performances, and that it is of great importance to such owners of copyrights to have that
11 question finally passed upon and determined, and for the purpose of obtaining such final determination promptly this deponent respectfully applies that this cause may be advanced upon the docket of this court and be set down for a day certain for argument.

WALTER LEROY COGHILL.

Sworn to before me this
13 day of October, 1916.

CHARLES OTT,
Notary Public,
Bronx County, No. 4.
12 Certificate filed in New York County, No. 4.
New York County Register's No. 8011.
Commission expires March 30, 1918.
(SEAL)

Supreme Court of the United States

Supreme Court of the United States

THE JOHN CHURCH COMPANY,
Complainant-Appellant,

against

HILLIARD HOTEL COMPANY and
HENRI DE MARTINI,
Defendants-Appellees.

STATE OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

CHARLES J. CAMPBELL, being duly sworn, says that he is one of the attorneys for the defendants-appellees herein, and had charge of the case in the courts below.

This case involves practically the same issues of law that are involved in the case of Victor Herbert *et al.* against the Shanley Company, which is No. 427 on the calendar of this Court and in which a motion was made to advance, upon the same grounds that are alleged in this motion, and on June 5, 1916, was denied by this Court.

Both the Herbert against Shanley case, No. 427, and this case, No. 433, are brought to determine the question whether a performance of copyrighted music in a hotel or restaurant dining room to which no admission fee is charged, and which performance is incidental to the business of the sale

4 and service of food, is a performance for profit, within the scope of the copyright law.

For the reasons stated, if it meets with the approval of the Court, counsel for the defendants-appellees in this case would be very glad to have this case and the Shanley case argued and considered together; and respectfully prays that this case be set down for argument, in due course, at the same time that the Shanley case, No. 427, is heard.

CHAS. J. CAMPBELL.

Sworn to before me this
23rd day of October, 1916.

5 HANNAH R. FRANK,
Commissioner of Deeds,
New York City.
New York County Clerk's No. 234.
New York County Register's No. 18092.
Term expires October 10, 1918.

6

Office Supreme Court, U. S.
FILED
APR 1 1916
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1915.

THE JOHN CHURCH CO.,

Petitioner,

against

HILLIARD HOTEL COMPANY and HENRI DE MARTINI,

Respondents.

NOTICE OF MOTION AND PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

HOUSE, GROSSMAN & VORHAUS,
Attorneys for Petitioner,
No. 115 Broadway,
Manhattan,
City of New York.

The Hecla Press, 57 Warren St., N. Y. Tel. 6230 Barclay.

Notice of Motion.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

THE JOHN CHURCH CO.,
Petitioner,

against

HILLIARD HOTEL COMPANY and HENRI DE MARTINI,
Respondent.

Sirs:

PLEASE TAKE NOTICE, that upon the annexed petition, and upon a certified copy of the record herein 3
to be presented with the said petition, an application will be made to the Supreme Court of the United States, at a Term thereof, held at the Capitol in the City of Washington, on the 3rd day of April, 1916, at the opening of the Court on that day or as soon thereafter as counsel may be

4 heard, for a writ of certiorari herein as applied for in said petition.

Dated, New York, N. Y., March 16, 1916.

Yours, etc.,

HOUSE, GROSSMAN & VORHAUS,
Attorneys for Petitioner,
Office & Post Office Address,
No. 115 Broadway,
Borough of Manhattan,
City of New York.

To:

5 CAMPBELL & BOLAND, Esq
Attorneys for Respon
51 Chambers Stree
New York Cit

6

Petition. 7

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1915.

THE JOHN CHURCH CO.,
Petitioner,

against

HILLIARD HOTEL COMPANY and HENRI DE MARTINI,
Respondents. 8

To the Honorable the Supreme Court of the United States:

The John Church Co. hereby petitions for a writ of certiorari directed to the Circuit Court of Appeals for the Second Circuit to review the judgment and decree of that Court rendered on the 6 day of January, 1916, affirming a decree of the District Court of the United States for the Eastern District of New York, entered on the 14th day of May, 1915, dismissing the petitioner's Bill of Complaint, with costs.

Your petitioner respectfully shows that it is a corporation duly organized and existing under and by virtue of the Laws of the State of New York, having its office and principal place of business in the Borough of Manhattan, State of New York. 9

That on or about the 11th day of June, 1914, your petitioner brought an action in equity in the United States District Court for the Southern District of

10 New York against Hilliard Hotel Company and Henri de Martini, as defendants, under the provisions of the Copyright Law, in and whereby it was sought to restrain the said defendants from an infringement of a copyright owned by your petitioners upon a certain musical composition known as a march "From Maine to Oregon" and forming a part of a musical composition known as a Lyric Comedy and entitled, "The Glass Blowers"; and upon the Bill of Complaint and affidavits annexed thereto, duly noticed for argument, a motion for preliminary order of injunction to issue during the pendency of the said action, that a subpoena was thereupon duly issued upon the said
11 Bill of Complaint and the defendants duly appeared therein and interposed an answer and affidavits, and that thereupon the said motion or application for an injunction was duly brought on for argument before the Hon. E. H. LACOMBE, who after a hearing of the said matter issued an injunction restraining the infringement of the complainant's copyright as alleged in the said Bill of Complaint, that thereupon the defendants duly appealed from the said order to the United States Circuit Court of Appeals for the Second Circuit, and in order to avoid the printing of numerous papers, a stipulation was thereupon entered into between the attorneys for the complainant and the attorneys for the defendant as to the facts, which conceded the validity of
12 the copyright claimed by the complainant and the due publication of notice thereof, and then conceded in regard to the alleged infringement of the said copyright the following facts:

That the defendant Hilliard Hotel Company is a domestic corporation, created by and under the Laws of the State of New York, conducting and carrying on a hotel known as the Vanderbilt Hotel,

situate at the corner of Park Avenue and 34th 13
Street, in the Borough of Manhattan, City of New York, for the accommodation of travelers and guests, and that the defendant Henri de Martini is the leader of an orchestra employed by the defendant corporation and paid by it for services rendered in conducting an orchestra consisting of musicians, also paid by the defendant corporation, for the purpose of the entertainment of its guests by furnishing music in the dining room of the said hotel during mealtimes. No charge was made by defendant or its said leader for admission to the dining room in which said music was performed as aforesaid, nor for the privilege of hearing such performance. No additional charge was made for 14
meals furnished at the time when such music was performed, over the charge made when there was no music.

That on the 27th day of May, 1914, at the said Hotel Vanderbilt, the said defendant Henri de Martini, acting as the leader of said orchestra under said employment, for and in behalf of the defendant corporation, and by its authority and consent, caused to be performed by said musicians in the dining room of said hotel for the entertainment and in the presence of guests thereof, without any charge to them as aforesaid, the said musical composition, "From Maine to Oregon" the copyright whereof is owned by the complainant as aforesaid. 15

That the said performance was without the express authority or consent of the complainant.

That the defendants at the time of the commencement of this action intended to cause to be given similar performances at the said Hotel Vanderbilt, for the purpose and in the manner hereinbefore de-

16 scribed, and without the express authority and consent of the complainant.

That upon the said appeal the said order for injunction was reversed by the Circuit Court of Appeals and that upon such reversal the said Court wrote an opinion, which is published in volume *221 Federal Reporter,* at pp. 229, *et seq.*

That thereupon the action came on for trial and that for the purposes of the said trial the same stipulation as to facts was entered into between the parties as had been entered into upon the former appeal herein, and which is contained in the record (fols. 64-74), and that thereupon the Trial Judge deeming himself bound by the decision
17 of the Circuit Court of Appeals reversing the order for an injunction herein, dismissed the complainant's complaint with costs, and that a decree was entered thereupon, accordingly.

That thereupon an appeal was duly taken by this petitioner from such decree to the Circuit Court of Appeals for the Second Circuit, and that the said Court affirmed the said decree dismissing the complainant's complaint. That no opinion was written or delivered by the said Circuit Court of Appeals upon the said affirmance, but that undoubtedly the said Circuit Court of Appeals followed the opinion rendered upon the previous appeal as aforesaid.

Your petitioner claims that the decision of the
18 said Circuit Court of Appeals made in the first instance and followed in affirming the decree of dismissal of the complainant's complaint, erroneously construes the provisions of the Copyright Act, and that the said Circuit Court of Appeals erred in holding that the plaintiff had failed to establish a cause of action sustaining the dismissal of the com-

plaint, and your petitioner contends that a proper 19
construction of the Copyright Act prohibits performances at Hotels under the circumstances described in the complainant's complaint and conceded by the stipulated facts herein, without the authority of the owner of the copyright. That a large number of musical compositions as to which the copyright is owned by the complainant in the action herein referred to, are similarly performed throughout the country at hotels under the same circumstances as established in this action, and that a large number of copyrighted compositions are performed throughout the country at hotels without the recognition of the rights of the owners of such copyright or the payment of any royalty or 20
other compensation to such owner, and that it is of the utmost importance to owners of copyrights to have the question as to the legality or illegality of such performances finally established, and that such question is of great importance and should be reviewed by this Court.

WHEREFORE, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify the case to this Court for review and determination, as provided in the Act of Congress designated as the Judicial Code, and that your petitioner may have such other 21
and further relief in the permises as to this Court may seem appropriate and in conformity with the said Act.

And your petitioner will ever pray, etc.

THE JOHN CHURCH CO.,
By MOSES H. GROSSMAN,
Counsel for the Petitioner.

22 UNITED STATES OF AMERICA,
STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

MOSES H. GROSSMAN, being duly sworn, says that he is counsel for the John Church Co., the petitioner named in the foregoing petition, and as such had charge for it of the case in the said petition mentioned, in the District Court of the United States for the Eastern District of New York and in the United States Circuit Court of Appeals for the Second Circuit, that he has read the said petition by him subscribed and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge, information and be-
23 lief.

MOSES H. GROSSMAN.

Subscribed and sworn to before me
this 7th day of February, 1916.

PETER A. LEE,
Notary Public (Seal),
New York County.

24

No. 930

FILED
APR 1 1916
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1915.

THE JOHN CHURCH CO.,

Petitioner,

against

HILLIARD HOTEL COMPANY and HENRI DE MARTINI,

Respondents.

BRIEF IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI.

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The Hecla Press, 57 Warren St., N. Y. Tel. 6280 Barclay.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

THE JOHN CHURCH CO.,
Petitioner,

against

HILLIARD HOTEL COMPANY and
HENRI DE MARTINI,
Respondent.

BRIEF IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI.

The respondent opposes the issuance of a writ of certiorari in this case for the following reasons:

The matter at issue is simple and has been exhaustively examined and clearly determined by the Circuit Court of Appeals for the Second Circuit in two separate cases, *Church* v. *Hilliard*, 221 Fed. Rep., 229, and *Herbert, et al.*, v. *The Shanley Company*, 222 Fed. Rep., 344, in both of which cases motions for writs of certiorari are now simultaneously made.

This case involves only one issue of law, to wit: Is a performance of a copyrighted musical composition, given by paid performers in a hotel dining room for the entertainment of its patrons, as a part

of the operation of the hotel, when no charge is made to patrons for the privilege of listening to such performance, a performance for profit within the meaning of Section 1, Sub-division e, of the Copyright Act?

POINT I.

The performance of a copyrighted musical composition in a hotel, to which no admission fee is charged and where the musical entertainment is incidental to the hotel business, is not a performance for profit within the meaning of Section 1, Sub-division e, of the Copyright Act.

A. *The whole controversy herein arises over the meaning of the words "for profit."*

In the District and Circuit Courts, in both the *Hilliard* and the *Shanley* cases, counsel for the publishers urged, as they now urge here, that this expression means "*for pay*" and also "*for any business purpose.*" This respondent, on the other hand, contends that the expression has no such broad meaning, but refers to performances to hear which an admission fee is charged, regardless of whether the performance produces a profit or is given with that purpose in view.

All parties interested in this litigation have agreed throughout that a performance where an admission fee is charged is a performance for profit.

The Copyright Act is silent as to the meaning of the words "for profit," except in Section 1, referring to coin-operated machines, which provides that:

> "The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs."

Appellant urges that the performance of music is for profit because it is a part of the service in connection with the meal for which the restaurant receives pay. Music is not a necessary incident to the service of food; the guest who pays for a meal cannot insist upon having music during meals. Music is played only during certain hours, although meals are served at all hours, and the price of food and service is the same during the time when music is played as it is when the music is not furnished (Rec., fol. 71).

It may be assumed that the purpose for which the music is played is to attract patrons. This brings us back to the question whether the *purpose* with which the free performance is given determines its character as a performance for profit, in the absence of any proof that the free music actually increases the patronage and the gross receipts of the hotel from sale of food. The profits, if any, flowing from the free performance of music, are remote, conjectural and speculative.

If it is true that every free performance of music is for profit simply because it is given in the hope of attracting trade, then not only hotels and restaurants, but all other business establishments which furnish free music to their patrons, and also the paid performers, will be subject to a performing royalty. Not only this, but all paid musicians giving free performances of copyrighted music at any public meeting would be subject to a royalty.

In fact, counsel in the *Shanley* case contends that no musicians who are paid to give a public performance are exempt from payment of royalty unless their performance falls within the exceptions enumerated in Section 28 of the Act, which provides:

> "That nothing in this Act shall be so construed as to prevent the performance of religious or secular works, such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit."

If this contention is sound, all paid performers would be subject to royalty even though they gave a concert for charitable or educational purposes, because they are performing for profit to themselves, and Section 28 only excepts performances of specified musical works by public schools, church choirs or octavo choruses.

A band employed by a municipality to give a free open-air concert for the benefit of citizens would be subject to royalty for each copyrighted selection performed.

A musician employed in a music store to perform a piece of copyrighted music in order to sell it for the mutual profit of composer and dealer would be giving a public performance for profit, and subject to royalty.

In this last case the absurdity and far-reaching consequences of counsel's contention are forcibly illustrated; the composer, according to counsel for petitioners, would be entitled to receive three separate royalties: (1) on the sale of the music from the publisher to the dealer; (2) from the dealer

who procures the performance to be given for a business purpose; (3) from the paid performer, who stands in the same position as the defendant De Martini in the case at bar.

It does not seem possible that Congress could have intended that the enumeration in Section 28 of certain special cases where music may be publicly performed without the consent of the owner of the copyright, should be exclusive, and thus nullify the provisions of Section e of paragraph 1 of the Act.

B. *There is no conflict between the Federal and State courts on this question.*

The appellant cites the *Weistblatt* case (58 Misc., 328) to support his argument that the Supreme Court of New York in an analogous matter has held that in an "indirect way a profit was made" out of a moving picture show operated as an inducement to draw trade to an ice-cream saloon, although no entrance fee was charged to such show. This is misleading.

The *Weistblatt* case was decided by the Supreme Court at Special Term in 1908. In 1912 the Court of Special Sessions of New York County reached exactly the opposite conclusion in the case of *People* v. *Martin*, 137 N. Y. Supp., 377, which held that a cabaret show in a restaurant was not a public performance for profit, because the show was merely incidental to the restaurant business, and hence required no license.

Again, in the case of *People* v. *Wacke*, 77 Misc., 196, decided by the County Court, Kings County, in June, 1912, that court held that one conducting a hotel is not guilty of violation of an ordinance

which prohibits conducting a common show without a license, by exhibition in such hotel of moving pictures, no admission fee being charged. The Court said, at page 200:

> "The defendant was not engaged in the moving picture business. He was conducting a hotel and was engaged in the hotel and liquor business. *He was exhibiting the pictures for the entertainment of his guests as an incident to his hotel business at the seashore.* The case of *People* v. *Royal*, 23 A. D., 258, seems to me to be decisive of the question under consideration."

In the *Royal* case the Appellate Division of the Supreme Court held that a person who hired a room where he illustrated tricks and devices of gamblers for the purpose of selling a book, no admission fee being charged, was not engaged in conducting an exhibition which required a license. The Court said the *sale of the book*, not the exhibition, *was the principal thing.* So in this case, the *sale of meals*, and not the performance of music, *is the principal thing and the source of profit, if any, to the hotel.* In the *Royal* case the Court said:

> "It is not denied but that the word exhibition, in its broad significance, would embrace what the defendant did in this case. But it is quite evident that the word, as used in the ordinance in question, is so used in a sense much more restricted. Given its broadest signification, there are a large class of business men that use various methods to attract custom and sell their goods that would be brought within its terms. Every contrivance for the automatic movement of dumb figures, used in display windows to attract attention, every exhibit of paintings for sale or to arouse interest and to attract

> visitors to public marts of trade, every person exhibiting exercising apparatus through the medium of an automaton or human being, every person displaying advertising matter, pictures and designs by means of a stereopticon, are a few of the very many things which would be brought within this ordinance if the word were to be construed in its general sense. The connection in which it appears in the ordinance shows that its meaning has relation to entertainments where the exhibition itself is the principal thing and from which the exhibitor derives or expects to derive profit."

All these cases, which were cited and evidently considered by the Circuit Court of Appeals in the *Hilliard* case, show that the State Courts and the Federal Courts are not in conflict in regard to the principle involved in the case at bar.

C. *The Sarpy case distinguished.*

The case of *Sarpy* v. *Holland* was followed by Mr. Justice LACOMBE in granting the original injunction order which was reversed by the Circuit Court of Appeals. This is the only case which the learned counsel for the publishers, both in the *Hilliard* case and the *Shanley* case, have been able to find, in their exhaustive research of the books, in support of their contention that a gratuitous performance of music is for profit if given as an incident to any business enterprise. The Court decided the *Sarpy* case under Section 1 of the English Copyright Act of 1882, which is as follows:

> "On and after the passing of this Act, the proprietor of a copyright in any musical composition first published after the passing of this Act, or his assignee who shall be entitled to and be desirous of retaining in his

> own hands exclusively *the right of public representation or performance of the same*, shall print or cause to be printed upon such title page of every published copy of such musical composition a notice to the effect that *the right of public representation or performance is reserved.*"

The *Sarpy* case is distinguishable from the case at bar. It will be noted the English statute confers greater rights upon the composer than the American. *Neither the words "for profit" nor any equivalent expression appear in the English Act;* hence, any public performance, whether it is for profit or not, is an infringement. The English Act gives the copyright owner of a musical composition the same rights which the United States Copyright Act gives to the owner of a drama or dramatico musical composition.

Dated, April 1st, 1916.

CAMPBELL & BOLAND,
Attorneys for Respondents,
51 Chambers Street,
New York City.

Levi Cooke and

CHARLES J. CAMPBELL,
of Counsel.

FILE
DEC 19 1
JAMES D. MA

Supreme Court of the United States

THE JOHN CHURCH COMPANY,
Petitioner,

against

HILLIARD HOTEL COMPANY and
HENRY DE MARTINI.

No. 438

BRIEF FOR PETITIONER.

MOSES H. GROSSMAN,
WILLIAM GROSSMAN,
LOUIS J. VORHAUS,
Solicitors for Petitioner.

LOUIS J. VORHAUS,
of Counsel.

The Hecla Press, 57 Warren St., N. Y. Tel. 6230 Barclay.

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Supreme Court of the United States

THE JOHN CHURCH COMPANY,
Petitioner,

against

HILLIARD HOTEL COMPANY and
HENRY DE MARTINI.

BRIEF FOR PETITIONER.

This is a writ of certiorari, issued by this Court to the Circuit Court of Appeals for the Second Circuit, for the review of its decree affirming a decree of the District Court of the United States for the Southern District of New York, which dismissed the complaint of the petitioner.

The action was brought under the Copyright Act to enjoin the Hilliard Hotel Company and Henri de Martini from performing in the dining room or any other part of the Hotel Vanderbilt, in the Borough of Manhattan, City of New York, the musical composition entitled "From Maine to Oregon."

The facts were stipulated as follows: The petitioner is the proprietor of an original musical composition by John Philip Sousa, entitled "From Maine to Oregon," which was duly copyrighted and

published, and the copyright whereof was duly assigned to the petitioner (Rec., fols. 22, 23).

The Hilliard Hotel Company is the proprietor of the Hotel Vanderbilt, and Henry de Martini is the leader of an orchestra engaged by said Hilliard Hotel Company, and is paid by it for services rendered in conducting an orchestra consisting of musicians, also paid by said company to furnish music in the dining room for the entertainment of its guests, no charge being made for admission to the dining room or for the privilege of hearing such performance (fol. 24).

On the 27th day of May, 1914, the said composition "From Maine to Oregon" was, without the petitioner's consent, performed by such musicians, under such leadership, in the dining room of the Hotel Vanderbilt, in the presence and for the entertainment of the guests thereof, and by the authority and consent of the defendant corporation, and the defendants intended to give future performances of such copyrighted composition (Rec., fols. 24-25).

The bill of complaint prayed for the granting of an injunction against such future performances (Rec., fols. 5-6) upon the contention that they constituted a violation of petitioner's right under the Copyright Act.

The cause coming on for trial at an Equity Term of the Court, the complaint was there dismissed (Rec., fols. 26-27), and such decree was affirmed on appeal (Rec., fol. 36).

POINTS.

I.

The performance complained of was a public performance.

This has been heretofore conceded in the proceedings under review, just as in *Brady* v. *Daly*, 175 U. S., 148, it was assumed that a performance on the stage was a public performance.

A hotel or inn is a public house, a place of public entertainment.

See:

Black's Law Dictionary, tit. "Hotel."

> "An inn-keeper, *as one carrying on a public employment*, is obliged to receive all travellers who properly apply to be admitted, provided he has room and they pay his reasonable charges."

22 *Cyc.*, 1074, and cases there cited.

See, also:

People v. *Jones*, 54 Barb. (N. Y.), 311.
People v. *Drum*, 127 App. Div. (N. Y.), 241, 242.

Under the law, then, a performance at a hotel is more properly characterized as *public* than that at a theatre, since admission to the former must be permitted to any proper applicant, while as to the latter a ticket of admission constitutes merely a revocable license.

Collister v. *Hayman*, 183 N. Y., 250.

II.

The performance complained of was a performance for profit within the purview of the Copyright Act.

The Copyright Act of March 4th, 1909, provides:

> "Sec. 1: That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:
>
> (e) To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit."

It is elementary that at common law a composer had, prior to publication, the exclusive right to perform his own composition, and since the Copyright Act, in so far as it limits this right, is in derogation of the common law, it must be strictly construed as against such limitation; hence the expression therein of the term "*for profit*" must be given its widest scope for the protection of the composer.

> "As giving effect to what may be considered the inherent right of an author in his own work, the provisions of the copyright acts should receive a liberal construction."
>
> 9 *Cyc.*, 897, and authorities there cited.

> "The copyright act in my opinion should be liberally construed, with a view to protect the just rights of authors and to encourage literature and art."
>
> *Ford* v. *Charles E. Blaney Amusement Co.*, 148 Fed. Rep., 642, 644.

See, also:

Werckmeister v. *American Lithographic Co.*, 142 Fed. Rep., 827.

An examination of the copyright laws of most countries shows that they afford a protection to the composer of a dramatic or dramatico-musical composition to the fullest extent by granting him the exclusive right to any public performance.

Thus it is provided in the *German Empire* by the Act of June 19th, 1901, as amended May 22nd, 1910, Article II, Section 11:

> "The author of a play or musical composition has also the sole right publicly to perform it";

and by the Copyright Act of *Austria,* Chapter II, Section 31:

> "The authorship of a musical composition embraces the right * * * to publicly perform."

Belgium Codes Law of March 22nd, 1888, provides:

> "Sec. c: Authors' rights upon Musical Compositions, Article 16: No Musical work can be publicly performed or executed in whole or in part without the consent of the author."

Switzerland Federal Law upon authors' rights upon works of art or literature, passed April 28, 1883, provides:

> "The sale of public rights of a dramatic or musical work do not include in itself the sale of performing rights. The author of said

> work has the right to make special conditions as to public performing rights should he mention a reservation to that effect."

In *France* a proceeding was brought in the Correctional Tribunal of Nice by certain members of the Society of Authors against Emile Gompel, manager of the Imperial Hotel, at Nice, for an infringement of a composer's right by performing a musical composition at his hotel, and judgment was there rendered on March 28th, 1906, which condemned the defendant to a fine of 50 francs and damages in the amount of 300 francs, besides costs. Upon appeal this judgment was affirmed, on June 14th, 1906, by the Court of Appeals of Aix Bouches du Rhone.

In this country the Copyright Law, prior to 1897, did not protect a copyright owner of a musical composition from the public performance thereof, but by the Act of January 6th, 1897, Section 4966 of the Revised Statutes was amended by providing a penalty for "any person publicly performing or representing any dramatic or *musical* composition for which a copyright has been obtained, without the consent of the proprietor of said dramatic or musical composition."

In the report (H. R. Rep., 2813, 54th Congress, 2nd Sess.) made to the House of Representatives on this bill it was stated:

> "The purpose of the proposed measure is twofold: First to secure to musical compositions the same measure of protection under the Copyright Law as is now afforded to productions of a strictly dramatic character. Secondly, for added means for the protection of authors of dramatic and operatic works."

And this Court, referring to that amendment, said:

> "The purpose of the amendment evidently was to put musical compositions on the footing of dramatic compositions so as to prohibit their public performance."
>
> *White-Smith Music Pub. Co.* v. *Apollo*, 209 U. S., 1, 16.

So that by that amendment the exclusive right to perform publicly was reserved to the copyright proprietor, and any public performance without his consent constituted an infringement, whether such performance were given for profit or not. And in respect of a copyrighted drama, this exclusive right to perform publicly is continued without qualification by the Act of 1909, Section 1 (d). This course of legislation evidences an extreme degree of caution on the part of Congress in determining to what extent the common-law rights of an author or composer should be abridged upon the grant of a copyright, and should be taken into consideration in the construction of the act.

Upon an interlocutory appeal in the present case the Circuit Court of Appeals expressed the opinion that "Congress seems to have meant by the words 'for profit,' a direct pecuniary charge for the performance, such as an admission fee, or a fee deposited in a coin-operated machine."

> *John Church Co.* v. *Hilliard Hotel Co.*, 221 Fed. Rep., 229, 231.

This ruling construes the statute strictly as against the copyright owner, rather than liberally in his favor, and also adds to the provision of the act a limitation against the rights of the composer, which not only is not expressed therein, but which

is contrary to the commonly accepted significance of the term "profit."

> "Profits are the advantages realized in money by the sale of property at a price exceeding the cost or the receipts of any enterprise or business exceeding the expense incident to it, and in this sense 'profits' and 'net profits' are for all legal purposes synonymous expressions * * *. The term 'profits' does not necessarily imply money but may include property other than money."
>
> 23 *Am. & Eng. Encyc. of Law* (2d ed.), pp. 189-191.

> "'Profits' generally mean the gain which is made upon any business or investment when both receipts and payments are taken into the account."
>
> *People ex rel. MacMaster & Harvey* v. *Board of Supervisors*, 4 Hill, 20 (N. Y.), at p. 23.

> "'Profit' is acquisition of gain above expenditures arising from some transaction or operation."
>
> *Cross* v. *Long Island Loan & Trust Co.*, 75 Hun (N. Y.), 533, at p. 534.

Mercantile ventures are ordinarily conducted upon the investment of money, not only for raw material and cost of manufacture, but also for rent, advertising, services in acquisition and distribution and other incidentals commonly termed "overhead" charges. The return upon the investment must reimburse all those items of expense before a profit is realized; each such expenditure enters into the computation upon which profit is based, and each such expenditure is made "*for profit.*"

The conduct of a hotel is no exception to the principle which controls all mercantile ventures. When a guest is charged so much for his room he pays not mere rent to the exclusion of all of the other elements which enter into the computation of the investment: when he pays for a meal his payment does not include merely the viands which he consumes to the exclusion of every other investment which is a part of the hotel enterprise. The guest in either event pays a share of the investment in, and profit upon, every incidental expenditure, whether or not required or enjoyed by him, and included in those returns is a reimbursement for the wages of every person employed by the hotel and an adequate profit thereon.

Since, then, the guest pays for the services of cooks, waiters, chambermaids and porters, all of which enter in the calculation of the hotelkeeper's investment, and upon all of which a profit is added by him, how can it be reasonably claimed that musicians who are hired for the entertainment of the guests are not paid for by them to the same extent as are the other servitors, or that the hotelkeeper does not charge a profit upon such expenditure upon the same principle and calculation which guide him as to every other part of his investment.

Clearly, the musical entertainment was part of the service furnished by the hotel, and the expenditure made for the payment of the musicians was an investment *for profit*, and the performance was, therefore, a public performance *for profit* and within the inhibition of the Copyright Act.

This is the view which was entertained by Judge LACOMBE, who, in granting a preliminary injunction in this case, said:

> "The circumstance that complainant could not prove any specific sum as 'profit' resulting from the playing of the copyrighted music seems to me immaterial. The place was 'public,' although all the public could not gather in it, and I think, as did the judges in *Sarpy* v. *Holland*, 99 L. T., 317, that the hotel would not have paid for the playing of the piece unless in some way or other they were to gain thereby."
>
> *John Church Co.* v. *Hilliard Hotel Co.* (U. S. D. C., S. D. N. Y., Aug. 13, 1914).

Sarpy v. *Holland & Savage*, 99 *Law Times* Reports, 317, was an action brought to restrain the infringement of a copyright granted under the Copyright Law of France and effective within the Kingdom of Great Britain, pursuant to the provisions of the International Copyright Convention, by the performance of a musical composition in the dining room of a hotel. The defendants alleged *inter alia* a license to perform under the following conditions appearing upon the face of the sheet of music which was utilized for the purpose of performance:

> "All rights of public performance reserved. This composition may be performed without fee at entertainments which are absolutely free, otherwise permission must be obtained from the Société des Auteurs, 32 Shaftesbury-avenue, London, W."

And:

> "This piece can be performed at private soirées and gratuitous public entertainments without fee or license."

And the questions raised upon the trial were as follows:

(a) Was the notice of reservation printed upon the published music in the French language sufficient for its protection?

(b) Did the license thus appearing upon the published music authorize a performance at a hotel where no admission fee was charged?

The complaint was dismissed in the first instance, but upon appeal to the Court of Appeals that judgment was reversed, the Appellate Court holding *inter alia*, per COZENS-HARDY, Master of the Records, pages 325-326:

> "The court having decided the point of law on the interpretation of the Copyright Act it was suggested that there was another issue which had not been tried in the court below —namely, whether a leave and license had not been given by the plaintiff or his predecessors to use the music in question. The license that was alleged was to perform the music at gratuitous public entertainments without fee or without a license. The learned judge in the court below took a view of the meaning of that license. In his view what took place at the Crown Hotel, as proved in the evidence, did not bring the case within the terms of the license, even assuming that the license had been given. Mr. Strachan asked that it might go back for a further trial upon that issue. It seemed to us that that would not be right unless we thought that, even assuming the license as pleaded to have been proved, it would suffice to save the defendant Savage from liability. We have heard argument upon that point. I feel no doubt whatever that the license does not justify what was done. This performance was paid for by Mr. Holland, the publican, with the view of gain; it was worth his while to pay, I think, 16s. a performance. It was obviously part of the means by which he attracted customers, and hoped to gain, and did gain a profit in carrying on the business of the hotel. That being so, it seems to me

> impossible to contend that this was a performance at a gratuitous public entertainment. Obviously the people who went in large numbers every night went there not merely in the expectation, but with the certainty that they would not go there, and indeed could not go there, without buying some of the commodities which Holland was there for the purpose of selling. The music was really part of the operations of the hotel; and the license cannot justify what was done."

A similar view was taken by the New York Supreme Court:

> "While no entrance fee is charged for this exhibition, it is evident that it is conducted for the purpose of drawing trade and of gathering people into the place to purchase soda or ice cream while viewing the pictures. A person who came in and occupied one of the chairs at a table, without ordering something, I imagine would not stay very long. *In this indirect way a profit is made out of the moving picture show.*"
>
> *Weisblatt* v. *Bingham*, 58 Misc. (N. Y.), 328.

If Congress had intended to limit the copyright owner's exclusive right to publicly perform to such performances only as were rendered for an admission fee or other direct payment, it could very readily have so provided by apt terms; that it had considered the subject of "admission fees" is apparent from the provision in Section 1 (e), that "the production or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit, unless a fee is charged for admission to the place where such a reproduction or rendition occurs," thus indicating

that in respect of other public performances the term "profit" was not to be restricted to performances for which an admission fee or other direct payment was charged.

The nature of the public performance which should not be deemed public performances for profit is indicated, if not fixed, by the exceptions which the statute provides.

Prior to this enactment the mechanical reproduction of a musical composition was not an infringement of the copyright thereon. By Section 1 (e) the copyright control is now extended to such mechanical reproduction, and the payment of royalties is secured to the copyright owner who has used or permitted the use of the copyright work upon the parts of instruments serving to reproduce mechanically the musical work. By the royalty so secured the copyright owner is compensated for such reproduction upon coin-operating machines. Consequently, notwithstanding such reproduction is obviously rendered for profit, it is provided by the act that it should not be deemed a public performance for profit, unless a fee is charged for admission to the place where such a reproduction or rendition occurs, thus indicating that the royalty was deemed a sufficient compensation upon the mechanical reproduction of a copyrighted musical work, unless an admission fee were charged, in which case the copyright owner was deemed entitled to be further compensated because of the additional profit derived from such admission fee.

Section 28 of the act provides "that nothing in this Act shall be construed as to prevent the performance of religious or secular works, such as oratorios, contatas, masses or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed or obtained from some public library, pub-

lic school, church choir, school choir or vocal society, provided the performance is given for charitable or educational purposes and not for profit." Thus, other than in case of reproduction upon coin-operated machines without admission fees, the only exceptions from the copyright control specifically provided by the act are in cases of performances for *charitable or educational purposes*, and this, we submit, indicates the underlying principle by which, according to the legislative intent, it shall be determined whether or not the performance is given for profit.

In the report made to the House of Representatives on this bill (H. R. Rep. No. 2222, 60th Congress, 2nd Sess.) reference is made to this portion of Section 28 as follows:

> "The existing law provides that any person publicly performing a dramatic or musical composition without the consent of the proprietor of the copyright shall be liable for damages of not less than $100 for the first and $50 for every subsequent performance, and this prohibition covers cases of public performances where the performance is not for profit. We have provided in this section that where the public performance is given by public schools, etc., for educational or charitable purposes, and not for profit, it may be done without subjecting those who give the performance to any suit for damages; and we further provide that the music used for the performance may be rented, borrowed, or obtained from public libraries or other public schools," etc.

If the term "for profit" is to be restricted to the case of an admission fee or direct payment, the way is easily opened for evasion of the statute by the

simple subterfuge of a charge for some service or commodity in connection with a public performance for which no admission is charged—a device by which anyone could with impunity publicly reproduce any copyrighted musical composition to his own profit, and in utter disregard of the copyright. The full measure of protection cannot be extended to the owner of the copyright, unless his control shall include every public performance given as a part of any enterprise undertaken for profit, and not coming within the exceptions provided; whether such profit be a direct return for the public performance, or a return upon the venture, to which the performance contributes, cannot be material, for it could not have been intended to give legislative sanction to any profit, direct or indirect, upon the public performance of a copyrighted musical composition without consent of the owner.

Whether the remuneration derived by a person from his services constitutes a profit, and so whether the musician in playing for hire performs for profit, need not be here determined. For when the paid musician participates with the hotel proprietor in rendering a public performance given by the latter for profit the musician is, equally with the hotel proprietor, an infringer of the copyright owner's exclusive right to perform publicly for profit.

Nor is it necessary here to consider the effect of a performance by a church, which, to some extent at least, is excepted by the proviso contained in Section 28 of the act. We are here concerned with a public performance given as a part of a commercial venture conducted for profit.

III.

The march "From Maine to Oregon" was a component part of the copyrighted dramatico-musical composition "The Glass Blowers," and the public performance thereof, whether for profit or not, without the consent of the petitioner was an infringement of the copyright.

Section 1 (d) of the Act of 1909 confers upon the copyright owner the exclusive right

> "to perform or represent the copyrighted work publicly if it be a drama * * * and to exhibit, perform, represent, produce or reproduce it in any manner or by any method whatsoever."

It appears by the stipulated facts that the march "From Maine to Oregon" was an integral part of an original musical composition known as Lyric Comedy entitled "The Glass Blowers" (fol. 22); that the entire composition "The Glass Blowers" was duly copyrighted (fol. 23), and the copyright certificate for the entire composition (Exhibit B, fol. 10) describes it thus: "Musical composition entitled The Glass Blowers. A lyrical comedy. Book by Leonard Liebling. Music by John Philip Sousa. Vocal Score." The term "lyrical comedy" obviously describes the work as a dramatico-musical composition. True, the certificate classifies it generally as a musical composition, but by Section 5 of the Act, it is provided:

> "Nor shall any error in classification invalidate or impair the copyright protection secured under this act."

By Section 3 of the Act, it is provided:

> "That the copyright provided by this Act shall protect all the copyrightable compo-

> nent parts of the work copyrighted and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this Act."

Under the foregoing provisions it is clear that the copyright upon the entire composition "The Glass Blowers" extended to the march "From Maine to Oregon" as a component part thereof, and that by virtue of that copyright, the complainant had the exclusive right to publicly perform the march, and that any public performance thereof without its consent, whether for profit or not, constituted an infringement.

The separate copyright upon the march itself did not operate to abridge or impair the exclusive right of public performance already obtained by virtue of the copyright upon the whole composition. The certificate of the copyright of this march (Exhibit C, fol. 11) on its face indicates that the march is but a part of the entire composition "The Glass Blowers," and the published orchestration thereof (Exhibit A) contains the same reference. The obtaining of a separate copyright for the march as a part of the entire composition was evidently a mere precautionary measure in order to facilitate the separate publication and sale of the march, and, under the circumstances, it did not have the effect of taking the march out of the operation and protection of the copyright obtained upon the whole composition as a dramatico-musical work.

Section 6 of the Act provides:

> "That compilations or abridgements, adaptations, arrangements, dramatizations,

> translations or other versions of works in the public domain, or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this Act; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works."

Although this section may not have direct application, yet, by analogy, it would seem to follow that the copyright obtained upon this march as a separate work did not affect the force or validity of the copyright originally obtained upon the entire composition, and that, therefore, the public performance of the march without the consent of the petitioner, infringed the copyright, whether such performance was given for profit or not.

IV.

The judgment of the Circuit Court of Appeals should be reversed, and judgment directed for petitioner, as prayed for in the bill of complaint.

Respectfully submitted,

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of Counsel.

No. 433

DEC 30 1916
JAMES D. MAHER
CLERK

Supreme Court of the United States

THE JOHN CHURCH CO.,

Petitioner,

against

HILLIARD HOTEL COMPANY and HENRI DE MARTINI,

Respondents.

BRIEF FOR RESPONDENTS

CHARLES J. CAMPBELL,
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LEVI COOKE,
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The Hecla Press, 57 Warren St., N. Y. Tel. 6280 Barclay.

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Supreme Court of the United States

THE JOHN CHURCH CO.,
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HILLIARD HOTEL COMPANY and
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BRIEF FOR RESPONDENTS.

To the petitioner's general statement of facts we wish to add only that not only was no charge made for admission to the dining-room or for the privilege of hearing the musical performance, but also no additional charge was made for meals furnished at the time when such music was performed over the charge made when there was no music (fol. 24).

POINT I.

The march "From Maine to Oregon" is a musical composition as distinguished from a dramatico-musical composition, the copyright of which is infringed only by public performance for profit.

The best evidence of the correctness of this contention is the music itself, between pages 4 and 5 of the record, an examination of which reveals that the march which was performed by the defendants

is indeed a musical composition, pure and simple, with no words or dramatic action.

Bowker, at page 177, has defined dramatico-musical compositions as "music and drama in association." And, indeed, without such association the name is a misnomer.

To the same effect:

Daly v. *Palmer*, 6 Blatchford, 256.
Fuller v. *Bemis*, 50 Fed., 926.
Barnes v. *Miner*, 122 Fed., 480.

When the petitioner's assignor copyrighted the march as a musical composition, he correctly followed Rule 9 of the United States Copyright Office, which reads as follows:

> "*Dramatico-musical compositions* include principally operas, operettas and musical comedies or similar productions which are to be acted as well as sung.
>
> Ordinary songs, even when intended to be sung from the stage in a dramatic manner, or separately published songs from operas and operettas, should be registered as musical compositions, not dramatico-musical compositions."

Rule 10 provides that musical compositions, including other vocal and all instrumental compositions, with or without words, should be copyrighted as musical compositions. In paragraph Seventh of their complaint (fol. 4) petitioner's attorneys reveal their appreciation of this fact by alleging that defendants, in violation of petitioner's right, "publicly performed for profit the said musical composition 'From Maine to Oregon' by an orchestra, pursuant to the orchestration as contained in Exhibit A."

Why the allegation of a public performance "*for profit*" and the elaborate argument in their Point II, if their Point III is urged seriously?

Between the attorneys for the parties to this action it has never been contended, on the one hand, that this was anything other than a public performance, nor, on the other hand, that what was performed was other than a musical composition, as distinguished from a dramatico-musical composition. The whole issue between us has been whether the performance was one *for profit* within the purview of the Copyright Act.

The learned counsel for Victor Herbert, in the case of *Herbert* v. *Shanley,* who has sought the privilege of presenting that case in conjunction with this one, intervened in this case in the Circuit Court of Appeals and urged the point, which our opponents have now for the first time urged upon this appeal, that because the march "From Maine to Oregon" was originally a part of a dramatico-musical composition, it retains its character as such notwithstanding its removal from its dramatic environment and its separate arrangement for orchestral performance only, without any dramatic element whatever left in it, and its publication, copyright and sale as a musical composition.

He argued with great earnestness that by the separate publication of a part of a dramatico-musical composition he loses none of his dramatic rights to exclusive public performance. We agree with his law, but it does not fit our facts. If this composition had any dramatic element left in it, we concede we could not perform it publicly without the consent of the copyright owner; but when he takes it out of his dramatico-musical composition, eliminates all its dramatic element, and copy-

rights, publishes and sells it as a musical composition, he gives it into the public domain as such, and as such it may be publicly performed without his consent if such performance is not for profit.

In the companion case at bar, Judge HAND disposes of this contention in the following language:

> "However, the authors took out a copyright upon the song separately as a musical composition, and in so doing they necessarily gave into the public domain all musical rights except as they were covered by the resulting copyright. Whatever be the minimum of musical rights, it includes the right to perform the music publicly without any unnecessary accessories. Singing the words to the music, accompanied by the orchestra, is therefore within the musical rights so dedicated. On the other hand we now have it on the authority of Church Co. against Hilliard, *supra*, that a public performance of this kind is not within the statutory copyright which the plaintiffs received as consideration for their dedication. It seems necessarily to follow that the performance did not infringe.
>
> This result no doubt involves the abandonment of some rights, secured by the dramatico-musical copyright, but that is because the plaintiffs wished a double protection. There can be no justice in preserving their dramatic rights at the expense of the public's rights arising from taking out a musical copyright. Had they wished to retain a complete dramatic monopoly, they had it in their power to do so. As it is, that monopoly remains to their complete protection except so far as its limitation is necessary to give full scope to the musical copyright. For instance, if the performance here had been anything beyond the least essentials to a musical reproduction of a copyrighted song, it would be protected, but it was not. The plaintiffs are really try-

> ing to eat their cake and have it; they would get the full benefit of a musical copyright, while they prevent the public from enjoying the corresponding rights."
>
> 222 Fed Rep., 344.

We do not claim that the appellants have lost their dramatic performing rights by separately copyrighting "From Maine to Oregon" as a musical composition, but their musical performing rights, we claim, are regulated by Subdivision E and not Subdivision D of Section 1 of the Copyright Law.

POINT II.

The performance complained of was not a performance for profit within the purview of the Copyright Act.

We take no issue with petitioner's argument that the Copyright Act should be liberally construed, but we disagree with his contention that the act limits any common law right of exclusive public performance of musical composition, against which limitation the statute should be strictly construed.

We believe the Copyright Act gives to composers of musical compositions the only rights to exclusive public performance which they ever possessed; and it has coupled that right with the condition that it attaches only to public performance *for profit*.

This Court has said that "there never existed any common law right of copyright in the United States"; that such right is purely statutory.

> *White-Smith Music Pub. Co.* v. *Apollo*, 209 U. S., 1.

On page 7 of his brief our opponent has quoted from the case just cited a casual reference to the

fact that the Copyright Act gives certain performing rights to musical compositions which they did not before possess. It was not necessary for the Court to determine in that case the distinction between dramatic copyright under paragraph "D" and musical copyright under paragraph "E" of Section 1.

The fact that the copyright laws of most countries, other than the United States, referred to on page 5 of our opponent's brief, give to the composer of a musical composition the exclusive right to publicly perform serves to emphasize the distinction which our own Copyright Act makes between dramatico-musical compositions to which it gives the exclusive public performing rights, and musical compositions to which it gives exclusive public performing rights only for profit. We believe that the Copyright Law of England and of most European countries differs from our own act in the same respect that it does in the countries to which our opponent has referred.

This case, therefore, as was stated by the Circuit Court of Appeals, turns upon the meaning of the words "*for profit*."

With the definitions of "profit" as an antonym of loss, which our opponent has gleaned from the books, we have no quarrel, but we cannot see their application to this case. Whether we make a profit or sustain a loss from the operation of our hotel business, even taking into account that the cost to us of providing free music is a part of the operating expenses, does not determine whether the music was performed for profit within the purview of the Copyright Act.

We contend that the words "*for profit*," in paragraph "E," mean *for pay;* that is, a performance to hear which a fee is charged.

We contend that it is not the purpose for which free performance is given, but the fact whether or not it is free, which determines whether the performance is "for profit" within the purview of the act.

The petitioner argues that if our contention is sustained it will be possible for us to evade the statute by making an additional charge for meals where music is played, or in some other indirect way to charge for the musical performance. If this should be done in any of the ways suggested by counsel for the publishers, it could easily be proved. If we should charge an admission fee to the room where music is played, by a ticket which would entitle the holder to a cup of tea or other light refreshment, the music might well be considered the main thing and the refreshment a mere incident to the performance. If we should charge more for meals in places where or at times when music is played, this would as easily be proved, and the Court doubtless would hold that we charged for music, and the amount of our charge for the music would be as readily determined as it would in the case of a straight admission fee.

In view of the fact that in the case at bar we made no such extra charge, we can justly say that neither directly nor indirectly have we charged for the music nor derived any profit or income from it. While our purpose in playing was to amuse our guests and attract others, whether the music did in fact accomplish this purpose is purely conjectural; the march "From Maine to Oregon" may have driven more patrons from our dining room than it attracted thereto.

It is true that the charge to the guest must cover the cost of his food and everything necessarily and reasonably incidental to its preparation and serv-

ice, but music is not a necessary incident to the service of food, and the guest who pays for a meal cannot insist on music while he eats. Every hotel is under legal obligation to furnish food and necessary personal service to its guests, but no hotel is under any express or implied obligation to furnish music. The time and place of performance, and whether any performance at all is given, rest in the discretion of the hotel. Music is furnished only at certain times, and meals are furnished at all hours, with no difference in charge therefor when music is furnished.

On page 14 of his brief the petitioner has quoted from a House Committee report as throwing light on the legislative intent in the use of the words "for profit," but a more direct and helpful light is thrown on this by the act itself. The words "for profit" are expressly defined in Section 1 of the act, with reference to coin-operated machines, as follows:

> "The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs."

It seems reasonable to assume that where the same expression is used twice in the same section of the act the legislative intent is the same in each case unless the contrary clearly appears.

The *Sarpy* case, referred to on pages 10 *et seq.* of petitioner's brief, was followed by Mr. Justice LACOMBE in granting the order which was vacated by the Circuit Court of Appeals. That case was decided under Section 1 of the English Copyright Act of 1882, which is as follows:

> "On and after the passing of this act the proprietor of a copyright in any musical composition first published after the passing of this act, or his assignee, who shall be entitled to and be desirous of retaining in his own hands exclusively the right of public representation or performance of the same, shall print or cause to be printed upon the title page of every published copy of such musical composition a notice to the effect that the right of public representation or performance is reserved."

The *Sarpy* case is readily distinguishable from the case at bar. In the first place, the English statute under which the *Sarpy* case was decided confers much greater rights upon the composer than the American. In England the owner of a copyrighted musical composition may, by printing notice thereof on each published copy, reserve to himself all rights of public performance or representation. The all-important words "for profit" do not appear in the English act, nor is any equivalent expression used. Hence, any public performance, regardless of whether it is for profit or not, is an infringement. In the United States, however, it is not enough that the performance is public; it must also be for profit.

Secondly, the defendants in the *Sarpy* case claimed to be acting under the permission contained in the notice of reservation which allowed the performance of the music at "gratuitous public entertainments" and "entertainments which are absolutely free." The Court held the defendants to a strict compliance with the terms of this license. But the language of the license differs materially from that of the American Copyright Act. An artist may perform a work "publicly for profit" at a

gratuitous public entertainment; and likewise, he may perform gratuitously at a "public" entertainment "for profit." In the first case the performance would constitute, under our law, an infringement by the artist, while under the conditions in the *Sarpy* case it would not; and the givers of the entertainment would be protected both under the *Sarpy* case and under our law. In the second instance they would be guilty of an infringement both under our law and under the *Sarpy* case.

With all due respect to the learned Judges who decided the *Sarpy* case, it is submitted that their reasoning in support of the judgment in that case is not convincing. They assign as the grounds of their decision that the performance was not a "gratuitous public entertainment": (1) The fact that the performance was paid for by the proprietor of the hotel "with a view of gain"; (2) It was part of the means by which he attracted customers; (3) The public could not go there "without buying some of the commodities which Holland was there to sell"; (4) The "music was really part of the operations of the hotel"; (5) "The license cannot justify what was done."

The last reason is inapplicable to the case at bar because the language of the license differs from that of our Copyright Act materially.

The first reason seems altogether inadequate. Does the fact that the proprietor of a hotel paid for the performance of the music, assuming, as the Court does, that he did it "with a view of gain," make any difference in the character of the performance in so far as its being gratuitous is concerned? If the public without restriction had been admitted to the saloon free of charge and without the necessity of buying anything there, could it be said that the performance was nevertheless not a

"gratuitous public entertainment" merely because the proprietor of the hotel had to pay for it?

As to the second ground, it is pure speculation, to say the least, to contend that a customer buys a meal because music is performed in the dining room. It is much more reasonable to assume that he does so because he is hungry.

The third ground may perhaps be a suitable test for a "gratuitous public entertainment," but it is not a proper test of whether the defendants are performing complainant's music "publicly for profit." These words in our act can only contemplate a profit derived from the performance of the copyrighted music, not a profit derived from the sale of meals in the dining room where music is played. When one cannot enter a place where music is being performed without buying something, the entertainment cannot be said to be "gratuitous" or "absolutely free"; and yet the *music* as such is not being performed "for profit" if no admission is charged. There is no profit derived from the performance of the music; the profit, if any, is derived from the sale of the meal.

By reason, therefore, of the difference in the statutes of this country and of England, as well as the circumstances under which the *Sarpy* case was decided, and the insufficiency of the reasoning of the Court in that case, it is respectfully submitted that the decision in that case should not govern the decision on this appeal.

Immediately following his reference to the *Sarpy* case the petitioner (p. 12 of his brief) cites *Weisblatt* v. *Bingham* (58 Misc. [N. Y.], 328) to the effect that a rule similar to that in the *Sarpy* case was adopted by the New York Supreme Court.

This is misleading; the rule in the *Weisblatt* case is not the law of the State of New York.

The question in the *Weisblatt* case was whether the exhibition referred to was a common show and therefore required a license.

The *Weisblatt* case was decided in 1908. In January, 1912, the Court of Special Sessions of New York County reached exactly the opposite conclusion in the case of *People* v. *Martin* (137 N. Y. Supp., 377), where it was held that a carbaret show in a restaurant was not a public performance for profit and hence required no license.

Again, in the case of *People* v. *Wacke*, 77 Misc., 196, the Court on a state of facts exactly like the *Weisblatt* case refused to follow that decision, saying, at page 200:

> "The defendant was not engaged in the moving picture business. He was conducting a hotel and was engaged in the hotel and liquor business. He was exhibiting the pictures for the entertainment of his guests as an incident to his hotel business at the seashore."

Both the *Martin* and the *Wacke* case follow *People* v. *Royal*, 23 App. Div., 258, which held that a person who hired a room where he illustrated the tricks and devices of gamblers, for the purpose of selling a book, to which exhibition no admission fee was charged, is not engaged in conducting an exhibition. The Court said the *sale of the book*, not the exhibition, was the *principal thing*. So the sale of meals and not the performance of music is the source of profit, if any, to the hotel.

POINT III.

The enumeration in Section 28 of the Copyright Act of certain special cases where music may be publicly performed without the consent of the owner of the copyright is not exclusive.

Section 28 and Subdivision E of Section 1 of the act must be read together.

There is nothing in the language of Section 28 to indicate that it is intended to cover all of the occasions when music may be publicly performed without the consent of the owner of the copyright. The Court may take judicial notice of the fact that the Copyright Act has been built up from time to time without any recent attempt at scientific arrangement of its provisions.

In Bowker on "Copyright, Its History and Its Law," at pages 165 and 166, the learned author says:

> "It should be noted that the omission from sub-section D as to drama, and the inclusion in sub-section E as to music, of the words 'for profit'—doubtless with the intent of assuring to the individual purchaser of music the right to perform it privately—have significance here, and serve to give the dramatic author absolute control even over gratuitous performances and to limit the control of the musical author to performances which are not gratuitous, a negative provision covering and giving much wider latitude than the proviso above cited (Section 28)."

As the Circuit Court of Appeals said in this case:

> "This proviso must contemplate the charge of an admission fee, because, if the perform-

> ance is really 'not for profit,' it would be perfectly lawful, both under section 1 (e) and under the prior provision of section 28 itself. We must attribute a more plausible intention to Congress. We think it was to permit certain high-class religious and educational compositions to be performed at public concerts where an admission fee is charged, provided the proceeds are applied to a charitable or educational purpose."
>
> *Church Co.* v. *Hilliard*, 221 Fed. Rep., 229.

The intent of the entire act is to be gleaned from the language of the act itself, in its present form, rather than from a report of a committee of Congress in connection with a particular amendment to the act. If the petitioner is right in his contention that all performances not expressly permitted by Section 28 are prohibited by the Copyright Law, then Subdivision E of Section 1 of the act is meaningless.

POINT IV.

Congress did not intend the far-reaching consequences of a decision sustaining appellant's contention.

If the petitioner is sustained in his contention that every performance of music is for profit, which is given in the hope of attracting trade or business, then not only hotels, but many other business establishments, from Maine to Oregon, will have to act as did most of the hotels in New York City while the original injunction order herein was in force, and dispense with the performance of copyrighted music owned by persons so short-sighted as

not to appreciate the benefits flowing to them from increased sales of music so brought to public notice.

If every free performance of music for the purpose of advertising or attracting business is "for profit" within the purview of the act, and no copyrighted music may be played for such purpose in any place to which the public has free access, without obtaining a special license from the owner, then a music store may not play copyrighted music for the purpose of selling an instrument or even the music itself. The public is invited to enter the store quite as much as it is to enter a hotel or a theatre.

A lone bugler walking down Pennsylvania Avenue playing "From Maine to Oregon" with an advertising placard on his back would infringe the right of public performance for profit as would his employer who thus advertised his business, although a performance of the same march on any mechanical instrument contained in a vehicle bearing the same advertising placard and following the same bugler down the avenue, would not infringe.

As was said by the Circuit Court of Appeals in this case:

> "If the complainant's construction of it (the Act) is right, then a church in which a copyrighted anthem is played is liable, together with the organist and every member of the choir, not only to injunction, but in damages in the sum of $10 for each performance, and the individuals perhaps to fine and imprisonment in addition."
>
> *Church Co. v. Hilliard, supra.*

Copyrighted music furnished in connection with a political parade organized to attract voters for a

candidate for a political office of honor and profit would infringe. Surely Congress never intended this.

The necessity of procuring a license for a public performance of music for pay will not prevent nor discourage such enterprises. It is easy for persons giving such concerts to determine from their receipts whether or not they are profitable. It is obvious, however, that the expense and inconvenience of procuring a license for free performances of music, the financial benefit of which is at best entirely conjectural, will greatly discourage and curtail such performances, which means decreased sales of musical publications and loss of employment by a large number of musicians.

It would seem, therefore, that Congress intended the words "for profit" in Subdivision E to mean a public performance for pay, where the profit, if any, is derived from the music itself and not from some other business to which the music is a mere incident.

It is, of course, no argument against petitioner's contention that it is novel. But there is some significance in the fact that although Subdivision E was enacted in 1897, this is the first case in the United States in which such a claim has been advanced. In the intervening seventeen years there have undoubtedly been countless performances of copyrighted music, both appellant's and others, under circumstances similar to the case at bar. Apparently there has been a general acquiescence among both the composers and publishers of music in the interpretation of the statute advanced by us. It is respectfully submitted that no valid reason has been urged for unsettling this condition of affairs and applying the act to situations not intended to be covered by it.

POINT V.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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of Counsel.

HERBERT ET AL. v. THE SHANLEY COMPANY.

JOHN CHURCH COMPANY v. HILLIARD HOTEL COMPANY ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 427, 433. Argued January 10, 1917.—Decided January 22, 1917.

The performance of a copyrighted musical composition in a restaurant or hotel without charge for admission to hear it but as an incident of other entertainment for which the public pays, infringes the exclusive right of the owner of the copyright to perform the work publicly for profit, under the Act of March 4, 1909, c. 320, § 1 (e), 35 Stat. 1075. 221 Fed. Rep. 229; 229 Fed. Rep. 340, reversed.

THE cases are stated in the opinion.

Mr. Nathan Burkan, with whom *Mr. Wm. J. Hughes* was on the brief, for petitioners in No. 427:

In support of the proposition that the performance was "for profit," see the opinion of Lacombe, J., sitting in the District Court in *John Church Co.* v. *Hilliard Hotel Co.*, 221 Fed. Rep. 229; *Sarpy* v. *Holland*, 99 Law Times, 317; *Weistblatt* v. *Bingham*, 58 Misc. (N. Y.) 328; *Wall* v. *Taylor, Wall* v. *Martin*, 52 L. J. Q. B. (n. s. Pt. 2), 558, 559; and *Pierce* v. *Milwaukee & St. Paul R. R. Co.*, 23 Wisconsin, 387.

Section 28 of the Copyright Law specifies in what instances musical works may be freely performed. House Report No. 2222, 60th Cong., 2d sess., p. 16; *White Smith Co.* v. *Apollo Co.*, 209 U. S. 16.

By the separate publication of the vocal number containing one copyright notice which correctly states the year when both the entire opera and the separate number

were copyrighted and the name of the proprietor of both copyrights, all rights secured by the copyright in the entire opera, including the dramatic performing right, are preserved with respect to the vocal number. *West Publishing Co.* v. *Edward Thompson Co.*, 176 Fed. Rep. 833, 837.

The performance was an infringement of the exclusive dramatic performing right secured by § 1 (d). The opera is a "drama." Drone on Copyright, p. 589; *The Iolanthe Case*, 15 Fed. Rep. 439, 442; Copyright Act, §§ 5 (d), 25 (b), subdiv. Fourth. The dramatic right extends to every material part of the opera. Section 3. Any unlicensed performance in any manner of a dramatic work infringes. *Mayor* v. *Eden Musee Co.*, 102 N. Y. 593, 595; *Russell* v. *Smith*, 12 Q. B. 217, 236.

Selling copies of the separate number gave no implied license to perform it publicly. Act, § 41; § 1 (a), (b), (d), (e); *Chappell* v. *Boosey*, 21 Ch. Div. (1882), 232–236.

Mr. Louis J. Vorhaus, with whom *Mr. Moses H. Grossman* and *Mr. William Grossman* were on the brief, for petitioner in No. 433.

Mr. Levi Cooke, with whom *Mr. A. S. Gilbert* and *Mr. Francis Gilbert* were on the brief, for respondent in No. 427:

The vocal number is not a dramatico-musical composition. *Fuller* v. *Blackpool Winter Garden*, 2 Q. B. (1895), 429, 442.

The dramatic performing right was not infringed. Copyright Act, § 5 (d), (e); Copyright Office Regulations, 8-d, 9, 10-e; Bowker on Copyright, pp. 162, 163.

The performance was not "for profit." It is not the purpose for which a free performance is given, but the fact whether or not it is free, which determines whether the performance is "for profit" within the purview of the act. The music was not a necessary incident to the service of food, and the guest who paid for a meal could not insist

on music while he ate. The time and place of performance, and whether any performance at all was given, rested in the discretion of the hotel. Music was furnished only at certain times and meals at all hours, with no difference in the charge therefor when music was furnished. While the purpose was to amuse and attract guests, whether it was actually accomplished is a matter of pure conjecture; the song "Sweethearts" may have driven more patrons from the dining-room than it lured into it.

The words "for profit" are expressly defined in § 1 of the act, with reference to coin-operated machines. The legislative intent is the same in each case. The *Sarpy Case*, 99 Law Times, 317, is distinguishable, and *Weistblatt* v. *Bingham*, 58 Misc. (N. Y.) 328, is overcome by *People* v. *Martin*, 137 N. Y. Supp. 377; *People* v. *Wacke*, 77 Misc. (N. Y.) 196; and *People* v. *Royal*, 23 App. Div. 258.

The enumeration in § 28 is not exclusive. To so hold would render the provisions of § 1 (e) meaningless.

Congress did not intend the far-reaching consequences of a decision sustaining appellant's contention.

Mr. Charles J. Campbell, with whom *Mr. Frank A. K. Boland* and *Mr. Levi Cooke* were on the brief, for respondents in No. 433.

MR. JUSTICE HOLMES delivered the opinion of the court.

These two cases present the same question: whether the performance of a copyrighted musical composition in a restaurant or hotel without charge for admission to hear it infringes the exclusive right of the owner of the copyright to perform the work publicly for profit. Act of March 4, 1909, c. 320, § 1 (e), 35 Stat. 1075. The last numbered case was decided before the other and may be stated first. The plaintiff owns the copyright of a lyric comedy in which is a march called "From Maine to Oregon." It took out a

separate copyright for the march and published it separately. The defendant hotel company caused this march to be performed in the dining room of the Vanderbilt Hotel for the entertainment of guests during meal times, in the way now common, by an orchestra employed and paid by the company. It was held by the Circuit Court of Appeals, reversing the decision of the District Court, that this was not a performance for profit within the meaning of the act. 221 Fed. Rep. 229. 136 C. C. A. 639.

The other case is similar so far as the present discussion is concerned. The plaintiffs were the composers and owners of a comic opera entitled "Sweethearts," containing a song of the same title as a leading feature in the performance. There is a copyright for the opera and also one for the song which is published and sold separately. This the Shanley Company caused to be sung by professional singers, upon a stage in its restaurant on Broadway, accompanied by an orchestra. The District Court after holding that by the separate publication the plaintiffs' rights were limited to those conferred by the separate copyright, a matter that it will not be necessary to discuss, followed the decision in 221 Fed. Rep. 229, as to public performance for profit. 222 Fed. Rep. 344. The decree was affirmed by the Circuit Court of Appeals. 229 Fed. Rep. 340. 143 C. C. A. 460.

If the rights under the copyright are infringed only by a performance where money is taken at the door they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are

expected to order, is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation or disliking the rival noise give a luxurious pleasure not to be had from eating a silent meal. If music did not pay it would be given up. If it pays it pays out of the public's pocket. Whether it pays or not the purpose of employing it is profit and that is enough.

Decrees reversed.